

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**

**CIVIL SUIT NO. 41 OF 2019 (OS)**

**JESSICA MARGARET ADHIAMBO OYIGO..**

**.....APPLICANT**

**- VERSUS -**

**CAFFINI PIERLUIGIA.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR, MOMBASA...2<sup>ND</sup>**

**RESPONDENT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgement of this Honourable Court pertains to the Civil suit instituted by *Jessica Margaret Adhiambo Oyigo*, the Applicant herein through an Originating Summons dated 13<sup>th</sup> March 2019. It was against *Caffini Pierluigia* and *the County Land Registrar, Mombasa*, the Respondents herein. The Applicant sought for the rectification of the land register in respect of Title No. CR.13827/1 – Sub - division No. 1618 of Section 1 Mainland North, Mombasa County (“The Suit Property”), alleging that a fraudulent lease was registered in favour of the 1<sup>st</sup> Respondent.
2. Upon filling of the Originating Summons the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their Replying Affidavits.
3. It is instructive to note that, during the pendency of the proceedings, the parties requested the Honourable Court to conduct a Site Visit (“*Locus in Quo*”) under the provision of Order

18 Rule 11 of the Civil Procedure Rules, 2010. On 7<sup>th</sup> February, 2025 the said Visit was held in the presence of the parties and a report forms part of the Judgement for ease of reference.

## **II. Court directions before the hearing**

4. After confirming that the Plaintiffs had complied with Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the hearing date on 27<sup>th</sup> April, 2023. The Applicant called their witnesses and closed their case on 27<sup>th</sup> April, 2023 and the Respondents called their witness on 20<sup>th</sup> March, 2024 and 29<sup>th</sup> July, 2024 and marked their cases closed on the respective dates.

## **III. The Applicant's case**

5. The Applicant claimed for land adverse possession against the Respondents on the following orders: -

**a. Spent.**

**b. A declaration that the Applicant is entitled to the exclusive and unimpeded right of possession and occupation of 1.098HA being all that piece of land known as TITLE No. CR 13827/1 - SUB - DIVISION NO. 1618 OF SECTION 1 MAINLAND NORTH MOMBASA COUNTY situated in Nyali, Mombasa County (the Suit Property).**

**c. THAT pending the hearing and the determination of this suit, the 1<sup>st</sup> Respondent, by himself, his employees, servants, tenants and/ or agents or otherwise howsoever be restrained from: -**

- i) Interfering in any manner whatsoever with the quiet and peaceable occupation, enjoyment, running and operation of the property.**
- ii) Harrassing, intimidating, threatening, or in any other way whatsoever interfering with the smooth running and operation by the Plaintiff/ Applicant, her**

**employees, her tenant (s), servants, agents, assigns or licensees, at the property.**

**d. THAT pending the hearing and determination of this Suit, the 1st Respondent, by himself, his employees, servants, tenants and/or agents or otherwise howsoever be restrained from: -**

**(i) Interfering in any manner whatsoever with the quiet and peaceable occupation, enjoyment, running and operation of the Property;**

**(ii) Harassing, intimidating, threatening, or in any other way whatsoever interfering with the smooth running and operation by the Plaintiff/Applicant, her employees, her tenant(s), servants, agents, assigns or licensees, at the Property.**

**e. An Order compelling the 2<sup>nd</sup> Respondent to remove the entries relating to the purported lease dated 2<sup>nd</sup> March 2018 to one Caffini Pierluigia for a term of 99 years from 1<sup>st</sup> June 1970 (a quarter portion carved out of 1618/1/MN) entered as an encumbrance and to reinstate the property to the status quo ante the fraudulent entries.**

**f. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.**

**g. Such other or further relief as this Honourable Court may deem appropriate**

6. The Original Summons was based on the following grounds on the face of it and those of the 15 paragraphed supporting affidavit sworn by JESSICA MARGARET ADHIAMBO OYIGO, the Applicant sworn on the same day with the Originating summons where the Affiant averred that:-

a) She was a female adult of sound mind residing and working for gain in the United States of America and was the Applicant in this case. Hence, she was competent to swear this affidavit.

b) She was the sole heir to the estate of Joshua Oluoch Oyigo (Deceased) and the Suit Property had been transmitted to

her via a Deed of Assent on 10<sup>th</sup> March 2017 pursuant to a Grant issued in Succession Cause No. H.C. 857 of 2005 in the High Court of Kenya at Nairobi. Annexed was a copy of the Certificate of Grant to the Suit Property and the County Government Property Rate Statement which was registered under her name, produced and marked as Exhibit “JMAO - 1a” and “JMAO - 1b” at pages 4 to 5.

- c) Her parents, JOSHUA OLUOCH OYIGO and PHILOMENA AGATHA OYIGO (both DECEASED), had acquired the property by way of a Transfer dated 16<sup>th</sup> April 1973 as joint tenants for a consideration of a sum of Kenya Shillings One Hundred Ninety-seven Thousand Five Hundred (Kshs. 197,500.00/=). Annexed was a copy of the Provisional Title Deed to the Suit Property, produced and marked as Exhibit “JMAO - 2” at pages 6 to 13.
- d) Sometime in April 2018 she had received various calls and emails from her tenant and neighbours that there were strangers who had visited the property severally claiming to be the owners.
- e) She had become apprehensive that she might be divested of her property and therefore instructed her lawyers, Messrs. Oraro & Company Advocates, to write to the Land Registrar, Registry of Titles Coast Registry Mombasa, and place a caveat on the property, which they accordingly did. Annexed was a copy of the letter dated 27<sup>th</sup> April 2018 in this regard, produced and marked as Exhibit “JMAO - 3” at page 14.
- f) A restriction under the provision of Section 76 of the Land Registration Act, No. 3 of 2012 had been duly registered against the title. Annexed was a copy of a Certificate of Postal Search as at 25<sup>th</sup> June 2018 with the said restriction, produced and marked as Exhibit “JMAO - 4” at pages 15 to 16.

- g) Upon receiving the Certificate of Postal Search the Affiant had come to realize that the Lands Registrar had unlawfully registered a lease dated 2<sup>nd</sup> March, 2018 to one Caffini Pierluigia for a term of 99 years from 1<sup>st</sup> June, 1970 (a quarter portion carved out of 1618/1/MN) as an encumbrance against her property.
- h) The said Caffini Pierluigia was not known to the Affiant and the particulars of the said unlawful lease were also unknown to her.
- i) The Suit Property had a permanent wall and the Affiant retained full and unfettered possession of the property.
- j) She had filed a Notice of Motion application dated 13<sup>th</sup> March 2019 following which this Honourable Court had issued temporary injunctive relief. Annexed were copies of the said Notice of Motion application, Supporting Affidavit and the Court's Order, produced and marked as Exhibits "JMAO - 5a", "JMAO - 5b" and "JMAO - 1c" at pages 25 to 56.
- k) The Affiant had suffered loss and/or damage as follows:  
Particulars of Loss and/or damage
- (i) The Affiant had been deprived of the use and quiet enjoyment of the Suit Property;
  - (ii) Unknown persons had interfered with her proprietary interest without any color of right and/or justification;
  - (iii) Unscrupulous persons had attempted to divest her of her proprietary rights and interests.
- l) It was only just and fair that the Affiant had exclusive and quiet possession over her lawfully acquired property and that the offending encumbrance be removed with immediate effect from the registers.
- m) She verily believed that she was entitled to Judgment against the Respondents as follows:**
- (i) A declaration that the Applicant was entitled to the exclusive and unimpeded right of possession and occupation of 1.098Ha being all that piece of land***

**known as TITLE NO. CR.13827/1 - SUBDIVISION NO.1618 OF SECTION 1 MAINLAND NORTH MOMBASA COUNTY situate in Nyali, Mombasa County (the Suit Property).**

**(ii) An Order compelling the 2<sup>nd</sup> Respondent to remove the entries relating to the purported lease dated 2<sup>nd</sup> March 2018 to one Caffini Pierluigia for a term of 99 years from 1<sup>st</sup> June 1970 (a quarter portion carved out of 1618/1/MN) and reinstate the property to the status quo ante the fraudulent entries.**

**(iii) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court might have deemed fit to grant.**

**(iv) Such other or further relief as this Honourable Court might have deemed appropriate.**

n) The Affiant swore this affidavit in support of the Originating Summons dated 13<sup>th</sup> March 2019.

7. The Applicant called PW - 1 on 27<sup>th</sup> April, 2023 at 11.00 am wherein the witness told the court that: -

**A. Examination in Chief of PW - 1 by M/s. Waihenya Advocate.**

8. PW - 1 was sworn and testified in English language. She was called JESSICA MARGARET ADHIAMBO OYIEGO, a Citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court during the hearing of the case. She resided in Peylsvinia in the United States of America. PW - 1 was the legally registered proprietor of the suit land, as referred to in the CR. The land had belonged to PW - 1's parents, who were then deceased. PW -1 had effected transmission to herself and obtained the title, which appeared at pages 6 to 15, the original being kept in safe custody at NCBA Bank, Nairobi.

9. PW - 1 stated that she had been made aware by the Caretaker of their land and a few neighbors that there were people coming to view the land, claiming that they had purchased it. PW - 1 had consulted Oraro & Company Advocates, who assisted her. PW - 1 later came to learn that there may have been a purported sub-division. The land was situated at Nyali Estate, and the tenant was Alliance Francise, occupying it for commercial purposes.
10. PW - 1 had been informed that the land had allegedly been sold to a third party, one MR. CAFFINI PIERLUIGIA, with whom PW - 1 had never dealt. PW - 1 was familiar with another case before the CMCC No. 20 of 2018, in which PW - 1 had sworn an affidavit. In that matter, PW - 1 had deposed that there had been no sub-division of the land and that PW - 1 had never sold it to anyone

**B. Cross Examination of PW - 1 by M/s. Asli Advocate.**

11. PW - 1 reiterated that she had discovered that a  $\frac{1}{4}$  acre portion of the suit land had been sold. PW - 1 stated that she had made inquiry from the Land Registry through her Advocate and discovered that the property was registered in the name of one CAFFINI. PW - 1 averred that she had not reported the matter to the police but had engaged her Advocates to deal with it.
12. PW - 1 stated that she had gone through the documents presented by CAFFINI and had seen a Power of Attorney bearing her names. PW - 1 reiterated that she had allegedly

donated authority to Gerald Omondi Onyango, but she refuted ever having given out such authority. PW - 1 averred that when she saw this, she had been alarmed. PW - 1 reiterated that she had not reported to the police but had instructed her Advocates, Oraro & Company Advocates, to deal with the issue of forgery. PW - 1 further stated that she had thereafter engaged M/s. Waihenya to handle the matter on her behalf.

13. PW - 1 averred that the Power of Attorney was registered and bore her photograph. PW - 1 reiterated that her neighbors had called her to inform her about intrusion and encroachment. PW - 1 stated that she had not provided any email. PW - 1 averred that she could not confirm receiving any money and denied having received any R.T.G.S. PW - 1 referred to page 34 of the Supporting Affidavit of the Originating Summons dated 28<sup>th</sup> January, 2019, which concerned payment of rates to the Municipal Council of Mombasa. PW - 1 reiterated her assertion that the lease had been fraudulently acquired by the Respondent.
14. PW - 1 stated that if there were any references to fraud from her pleadings, she might not have been able to particularize the fraud. PW - 1 averred that she had never executed the Power of Attorney and reiterated that she would be guided by her counsel at the appropriate time. PW - 1 stated that she was not aware of any sub-division of the suit land. PW - 1 reiterated that she had received a response from the Land Registry indicating that the portion of  $\frac{1}{4}$  acre had been

conferred from the main suit land, which she had never authorized. PW - 1 referred to the Official Search at page 45, specifically Entry No. 10 C.P. No. 5 by the Defendant, being Lease Entry No. 10, with a Provisional Certificate issued vide Gazette Notice No. 7 of 6.1.2017. PW - 1 averred that her own provisional title had been issued by Gazette Notice of 6<sup>th</sup> January, 2014.

15. PW - 1 reiterated that the property had been leased to Alliance Francize for 20 years. PW - 1 stated that she did not have the lease or tenancy agreement here in Court. PW - 1 averred that she was not sure whether a Defence had been filed in CMCC No. 20 of 2020.

**C. Cross Examination of PW - 1 by M/s. Kiti Advocate.**

16. PW - 1 stated that she had been aware of the Power of Attorney registered at the Land Registry, Mombasa, which she came to know of later on. PW - 1 reiterated that she had never authorized anyone to use the said Power of Attorney, which had been used to make the purported sale agreement. PW - 1 averred that, to her knowledge, the Land Registrar had registered the land without her authority. PW - 1 reiterated that it was possible for officers at the Land Registry to break the law.

**D. Re - Examination of PW - 1 by M/s. Waihenya Advocate.**

17. With reference to the Supporting Affidavit in the Case before the Chief Magistrate, specifically paragraphs 3 and 4 dated 20<sup>th</sup> March, 2019; PW - 1 reiterated that she had never given

the Power of Attorney to Gerald Omondi Onyango. PW - 1 further referred to the Official Search and the encumbrance at page 23, entry (16), which read “Restriction under Section 76 of the Land Registration Act”. PW - 1 averred that the said restriction had been placed through her lawyers.

**E. Clarification sought from PW - 1 by Court: -**

18. PW - 1 reiterated that she did not know any person by the name Gerald Omondi Onyango nor had she ever met him.
19. The Plaintiff marked their case closed on 27<sup>th</sup> April, 2023 through their counsel M/s. Waihenya Advocate.

**IV. The 1<sup>st</sup> Defendant’s case**

20. The 1<sup>st</sup> Defendant’s responded to the Originating summons through a 15 Paragraphed Replying Affidavit sworn by CAFFINI PIERLUHGIA, the 1<sup>st</sup> Defendant/ Respondent herein who averred as follows that:
  - i. He was an adult of sound mind and disposition, the 1<sup>st</sup> Defendant herein, thus competent to swear this affidavit in response to the Plaintiff’s Originating Summons dated 13<sup>th</sup> March 2020.
  - ii. He had read, understood and had the meaning and import of the contents of the Originating Summons dated 13<sup>th</sup> March 2020 (Hereinafter referred to as the “Summons”) and the Affidavit in support thereof (hereinafter referred to as the “Affidavit”) explained to him by his advocates on record, and he wished to respond as follows.

- iii. Save as was expressly stated herein, the matters deponed to were within the Affiant's knowledge or derived from documents in his possession or from advice tendered to him by his advocates on record. In so far as the matters deponed herein were within his knowledge, they were true, and in so far as they were derived either from documents which he had read or from advice given by his advocate aforesaid, the Affiant verily believed them to be true to the best of his knowledge and belief.
- iv. He was informed by his advocates on record, which information he verily believed to be true, that the suit was incompetent, frivolous, vexatious, bad in law and a gross blatant case of abuse of the Court process; the suit lacked merit and ought to have been dismissed *in limine*.
- v. The contents of grounds (i) and (ii) of the Summons and paragraph 1 to 3 of the Affidavit were admitted in so far as they were descriptive of the parties herein.
- vi. The contents of ground (iii) of the Summons and paragraph 7 of the Affidavit were denied in toto and the Plaintiff was put to strict proof thereof. Further, the Affiant was the registered proprietor and rightful owner of the parcel of land known as TITLE NO. C.R. 13827/1 - Sub - Division No. 1618 of Section of Section 1 Mainland North Mombasa County situate in Nyali, Mombasa County. The facts leading up to his acquisition of the parcel of land were as follows:
  - a. On or about 5<sup>th</sup> March 2018, the Affiant had entered into an agreement for the sale and purchase of a quarter of the parcel of land known as C.R. 13827/1 wherein he was the purchaser. (Annexed and marked as "CP - 1" was a copy of the Agreement for Sale dated 5<sup>th</sup> March 2018).
  - b. The vendor, one Jared Omondi Onyango Advocate, was a holder of a Power of Attorney dated 5<sup>th</sup> April

2017 wherein the Plaintiff had donated to him the irrevocable power of executing and acknowledging documents in respect of selling parcel of land sub - division L.R. Number 1618, registered in the Mombasa Registry of Land at Mombasa as C.R. 13827 in respect of the Suit Property.

- c. Thus, he was for all intents and purposes, an agent of the Plaintiff herein. (Annexed and marked as "CP - 2" was a copy of the said Power of Attorney).
- d. The purchase price was a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) less a sum of Kenya Shillings Two Hundred and Seventy Three Thousand Nine Hundred (Kshs. 273,900/-) being the estimated outstanding rates to be paid by the Affiant, which amount was deductible from the purchase price.
- e. On or about 3<sup>rd</sup> March 2018, the Affiant had executed a Lease Agreement in respect of the Suit Property for the unexpired residue of the term of Ninety-Nine (99) years from 1<sup>st</sup> June 1970.
- f. On or about 8<sup>th</sup> March 2018, the Affiant had paid the sum of Kenya Shillings Four Million Seven Hundred and Nineteen Thousand Five Seventy Eight Hundred (Kshs. 4,719,578.00/=) being the agreed purchase price less the deductions for outstanding rates. (Annexed and marked as "CP - 3" was a copy of the Swift transfer dated 8<sup>th</sup> March 2018).
- g. On or about 23<sup>rd</sup> March 2018, the Affiant had paid the outstanding sum of Kenya Shillings Two Hundred and Seventy Three Thousand Nine Hundred and Twenty Two (Kshs. 273,922.00/=) thereby settling the outstanding rates and marking the full settlement of the purchase price. (Annexed and marked as "CP - 4" was a copy of the official rate receipt and property rates statement).

- h. The above transaction had been registered at the Ministry of Lands and a duly registered Lease Agreement was issued in favour of the Affiant. (Annexed and marked as “CP - 5” was a copy of the duly registered Lease Agreement).
- i. The Affiant’s advocate had conducted a post-registration search that confirmed the purchase of the Suit Property and the registration of the aforementioned Lease. (Annexed and marked as “CP - 6” was a copy of the postal search).
- j. Subsequently, a Certificate of Title was issued in favour of the Affiant in respect of the Suit Property. (Annexed and marked as “CP - 7” was a copy of the Title).
- k. The Affiant denied all allegations of unlawfulness and/or fraud levelled against him and put the Plaintiff to strict proof thereof. He was advised by his advocates on record, which advice he verily believed to be true, that he was a bona fide purchaser for value without notice, equity’s darling, whose title could not be questioned or revoked on account of allegations of fraud perpetrated by others, if any.
- vii. In response to ground (iv) of the Summons and paragraph 8 of the Affidavit, the Affiant denied the allegations raised therein and put the Plaintiff to strict proof thereof. Jared Omondi Onyango Advocate, a holder of a Power of Attorney, was an agent of the Plaintiff and thus she was bound by the acts of her agent and was assumed to have constructive notice of the acts of her agent. Further, the Plaintiff was estopped from denying the Power of Attorney which spoke for itself.
- viii. In response to ground (v) of the Summons and paragraph 9 of the Affidavit, soon after a title was issued in favour of

the Affiant over the Suit Property, the Plaintiff breached the agreement for sale inter alia by trespassing into the land and failing to deliver vacant possession of the Suit Property, prompting the Affiant to instruct an advocate to institute a suit for vacant possession of the property, **“Mombasa CM ELC No. 20 of 2018 Caffini Pierluigi - Versus - Jessica Margaret Adhiambo Oyigo”** (through her attorney Jared Omondi Onyango), which suit was successful and a decree was issued declaring the Affiant as the legal owner of the property and requiring that the Plaintiff deliver vacant possession, amongst others. (Annexed and marked as “CP - 8” was a copy of the pleadings, Judgment and Decree emanating thereof).

- ix. In further response to ground (v) of the Summons and paragraph 9 of the Affidavit, the Affiant was advised by his advocates on record that the matter raised herein was in contravention of the aforesaid decree of the Court issued on 3<sup>rd</sup> April, 2019. The Plaintiff had instituted the suit as a fresh matter as opposed to preferring an appeal. The instant suit was res judicata as issues raised therein had been determined by a court of competent jurisdiction.
- x. Thus, the Plaintiff was orchestrating a gross abuse of court process, by galloping from one court to another fishing for a convenient verdict.
- xi. The Affiant urged this Honourable Court not to entertain such an abuse of its processes.
- xii. The Affiant was a stranger to the contents of Paragraph 4 of the Affidavit and put the Plaintiff to strict proof thereof.
- xiii. In response to Paragraphs 5 and 6 of the Affidavit, the Affiant denied the averments therein and put the Plaintiff to strict proof thereof.

- xiv. The contents of Paragraph 10 of the Affidavit were admitted in so far as they were descriptive of the pleadings therein.
- xv. He denied the contents of Paragraph 11 of the Plaintiff in toto and put the Plaintiff to strict proof thereof. If anything, the Affiant was the one who was at loss, as since the year 2018 when he completed payment of the purchase price and a Title was issued in his favour, he had never had quiet possession of his property. The Plaintiff had endeavoured to ensure she benefited twice by retaining the purchase price and possession over the property. The Affiant was advised by his advocates on record that she had approached this Court, as a court of equity, with unclean hands and was playing lottery with the Court hoping that this Honourable Court would legalize her fraudulent mechanizations.
- xvi. In response to ground (vii) of the Summons and paragraphs 12 and 13 of the Affidavit, the Affiant was advised by his Advocates on record and wished to respond as follows:
- a) The Plaintiff had not met the threshold for orders sought and was thus not deserving of a grant of the same.
  - b) The Affiant was a bona fide purchaser for value, the legal proprietor of the Suit Property whose rights to quiet possession and ownership were entrenched by the Constitution of Kenya 2010.
  - c) The Affiant was advised by his advocates on record, which advice he verily believed to be true, that the standard of proof in fraud was one that transcended a balance of probability but not beyond proof of reasonable doubt.

d) The Honourable Court ought to have dismissed the Summons and issued a declaration in favour of the 1<sup>st</sup> Defendant as a bona fide purchaser for value.

21. The 1<sup>st</sup> Defendant called its first witness on 20<sup>th</sup> March, 2024 wherein the witness DW - 1 testified as follows: -

**A. Examination in Chief of DW - 1 by Khadija Advocate: -**

22. DW - 1 was sworn and testified in English language. He was called CAFFINI PEIRUIGIA. He was the Respondent herein. He had seen an affidavit dated 8<sup>th</sup> December, 2021 and wished to rely on it, together with the documents annexed thereto. DW - 1 reiterated that he resided in Italy and averred that he was an Estate Agent.

**B. Cross Examination of DW - 1 by M/s. Waihenya Advocate.**

23. DW - 1 referred to the documents in ELC No. 20 of 2018 and ELC No. 29 of 2021, reiterating that both of them were the same. DW - 1 stated that it was true he had never met the Plaintiff and reiterated that he had never met the Plaintiff in relation to the execution of the document. DW - 1 averred that the transaction had been conducted with Mr. Jared Onyango, and that the document contained the name of the Plaintiff. DW - 1 stated that he had dealt with his Advocate, one Jane, and reiterated that he had never confirmed the details of the transaction.

24. DW - 1 was referred to the Power of Attorney dated 5<sup>th</sup> April 2017 and registered on 12<sup>th</sup> April, 2017. DW - 1 stated that on the last page it bore PIN No. A00583499M and Identification

Card No. 24628422 for Mr. Onyango, which he compared with the number on the lease and also with the sale agreement. DW - 1 reiterated that there was no reference made to the Power of Attorney registration number in the sale agreement. DW - 1 averred that the registration number for the Power of Attorney was 13827/1. DW - 1 referred to the signature page of the lease, stating that it was signed by Jared Onyango, whose photograph appeared there, together with P/A No. 17777. DW - 1 reiterated that he did not know whether it was the same or two different instruments, as they had been prepared by his Advocate.

25. DW - 1 stated that he had not confirmed the legal status of the Power of Attorney, as his Advocate had told him it was genuine. DW - 1 reiterated that the list of documents was dated and that the sale agreement had been prepared by his Advocate, while he only sent the money. DW - 1 referred to Clause 4.2 of the Sale Agreement, which was for a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=), and reiterated that they were to buy another plot thereafter under the Sale Agreement dated 2018. DW - 1 was referred to the R.T.G.S. for a sum of Kenya Shillings Four Million Seven Hundred Thousand (Kshs. 4,700,000/=), which had been advised as made to Steven Obaga Muriuki, though DW - 1 had been paying Jane Advocate to pay the owner of the land. DW - 1 reiterated that he did not know this person and averred that he had never paid M/s. Jessica Margaret Adhiambo.

26. DW - 1 stated that Mr. Steven Obaga Muriuki was a competent Advocate and was in the practice of conveyancing. DW - 1 confirmed that Alliance Francize occupied one part of the suit plot. DW - 1 reiterated that the suit land had two walls or boundaries, one dividing the plot. DW - 1 further stated that there was one perimeter wall for the suit land, but he did not know who had possession of the land. DW - 1 reiterated that one side was occupied by Alliance Francize.
27. DW - 1 averred that the guards on the property were his, as he had hired them. DW - 1 reiterated that he occupied one side of the land while Alliance Francize occupied the other side of the suit land. DW - 1 stated that he had been accompanied by the police and had used his own gate, being present on a few occasions.
28. DW - 1 referred to the official searches dated 8<sup>th</sup> March, 2018 and 25<sup>th</sup> June, 2018. DW - 1 stated that the search of 8<sup>th</sup> March, 2018 showed him as the registered owner, while the one of 25<sup>th</sup> June, 2018 showed Jessica Margaret Adhiambo with an encumbrance. DW - 1 reiterated that he was the owner of the property. DW - 1 was referred to the sale agreement, which talked of a quarter portion carved out of Plot No. 1618/I/MN CR - 13837/1, and clause 1.1 (g). DW - 1 stated that the correct search was for 25<sup>th</sup> June, 2018 and reiterated that the diagram attached to it was not an official one.
29. DW - 1 averred that he had acted depending on what he had been told by his Advocate. DW - 1 reiterated that he had been

asked to pay a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) and had done so. DW - 1 stated that he had never had time to verify the documents and reiterated that he knew the Power of Attorney had guided him in the transaction.

**C. Cross Examination of DW-1 by Ms. Kiti Advocate.**

30. DW - 1 confirmed that he had only gone once to the plot before purchasing it. DW - 1 stated that he had followed all the instructions that his Advocate had given him.

**D. Re - Examination of DW - 1 by M/s. Khadija Advocate.**

31. The witness referred to the Sale Agreement and stated that it had been signed by Jared Onyango. DW1 reiterated that Jared Onyango had referred or sent him the Power of Attorney. DW - 1 averred that he had never been summoned by the police regarding allegations that the Power of Attorney was not genuine.

32. DW - 1 was referred to Clause 1.1(i) of the Sale Agreement, which showed that the names of the Vendor's Advocate were Stephen Obaga Muriuki, and reiterated that they were the ones who had received the money for the purchase price. DW - 1 further referred to the search dated 8<sup>th</sup> March, 2018, which showed 0.0450 HA and C.R. No. 71063.

33. The 1<sup>st</sup> Defendant marked their case closed on 20<sup>th</sup> March, 2024 through their Counsel M/s. Khadija Advocate.

**V. The 2<sup>nd</sup> Defendant's case**

34. The 2<sup>nd</sup> Defendant called their 1<sup>st</sup> witness DW - 2 on 29<sup>th</sup> July, 2024 who testified as follows: -

**A. Examination in Chief of DW - 2 by M/s. Kiti Advocate.**

35. DW - 2 was sworn and testified in English language. She was called SHEILA SOITA - the Land Registrar, Mombasa. She informed Court that she was here with reference to the case before court. She had filed a witness statement dated 8<sup>th</sup> April, 2024 and wished to rely on it in support of the evidence of this case in Court. DW - 2, further stated that she had filed a List of Documents dated 20<sup>th</sup> April, 2023 consisting of one document, and a further List of Documents dated 20<sup>th</sup> April, 2023 consisting of two documents, which she wished to rely on as part of the record. DW - 2 averred that the 2<sup>nd</sup> Defendant's Exhibits "1 to 3" had been produced accordingly.
36. DW - 2 stated that, as per her statement, she had come to testify on Plot No. CR 13827. DW - 2 reiterated that the property had passed through many hands. She referred to Entry No. 9, where the Plaintiff had acquired the property through a Deed of Assets dated 8<sup>th</sup> March, 2017 and registered on 10<sup>th</sup> March, 2017. DW - 2 averred that Entry No. 10 showed that a Provisional Title had been issued by Gazette Notice No. 7 of 6<sup>th</sup> January 2017.
37. DW - 2 stated that thereafter a portion measuring  $\frac{1}{4}$  acre had been hived off from the same plot and sold to Caffini Pierluigia, the 1<sup>st</sup> Defendant. DW - 2 reiterated that it was a leasehold interest for 99 years dating back to year 1970.
38. DW - 2 referred to Entry No. 12, which showed that a restriction had been placed by the Land Registrar on 25<sup>th</sup> June,

2018 under Section 76 of the Land Registration Act, 2012. DW - 2 averred that the remainder of the land was owned by the Plaintiff.

39. DW - 2 reiterated that the application for the Provisional Title had been made by the Plaintiff, being the owner, and that there had been a Gazette Notice to that effect. DW - 2 referred to a letter dated 16<sup>th</sup> May, 2017 by the Law firm of Messrs. Oraro & Company Advocates addressed to the Land Registrar, in which they had requested the Registrar to make an amendment to Entry No. 10 for rectification of the name and the date of the Asset.

**B. Cross Examination of the 2<sup>nd</sup> Defendant witness by Ms. Khadija Advocate.-**

40. DW - 2 confirmed that Entry No. 11 was a portion hived off to the 1<sup>st</sup> Defendant. DW - 2 reiterated that, referring to the 1<sup>st</sup> Defendant's record, Entry No. 11 and the Provisional Title were the same. DW - 2 referred to Defendant's Exhibit No. 6, being the copy of the official search, and confirmed that it emanated from her office. DW - 2 stated that, to the best of her knowledge, the entry had been entered regularly and had not been challenged. DW - 2 reiterated that the payment of stamp duty was one of the requirements for the transfer.

**C. Cross Examination of 2<sup>nd</sup> Defendant witness by M/s. Waihenya Advocate.**

41. DW - 2 referred to the Provisional Title held by the Plaintiff and stated that the last entry was No. 10, being the issuance of

the Provisional Title. DW - 2 reiterated that there was no other entry, and that Entries 11 and 12 did not appear on the original title. DW 2 averred that the record materially differed from the one at the Land Registry.

42. DW 2 stated that she could not tell whether there had been involvement of the Plaintiff in the making of Entry No. 11. DW - 2 reiterated that she was not the Land Registrar who had dealt with the matter, and averred that the Land Registrar then was one J.G. Wanjohi. DW - 2 stated that the same applied to Entry No. 12.
43. DW - 2 referred to a letter dated 27<sup>th</sup> June, 2018 and an application for caveat by the law firm of Messrs. Oraro & Company Advocates, which had sought to forbid people from encroaching onto the Plaintiff's land. DW - 2 asserted that, as a result, the Land Registrar had registered the Restriction dated 27<sup>th</sup> June, 2018 pursuant to the provisions of Section 76 of the Land Registration Act, 2012, having felt there was improper dealing. DW 2 reiterated that this Restriction, being Entry No. 12, was still in place and had not been removed or lifted.

**D.Re - Examination of DW - 2 by M/s. Kiti Advocate.**

44. DW - 2 referred to Entry No. 12 on the restriction and stated that there had already been a lease under Entry No. 11.
45. On 29<sup>th</sup> July, 2024, the 2<sup>nd</sup> Defendant marked its case closed through its Counsel M/s Kiti Advocate.

**VI. Submissions**

46. On 10<sup>th</sup> December, 2024 after the Plaintiff/Applicant and Defendants/ Respondents marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on.
47. Pursuant to that, parties fully complied and the Honourable court reserved a date to deliver its Judgement on notice. Eventually, it delivered its Judgement on 23<sup>rd</sup> March, 2026 accordingly.

**A. The Written Submissions by the Plaintiff/Applicant**

48. The Plaintiff/Applicant herein filed their written submissions through the Messrs. Jacqueline Waihenya Advocate dated 22<sup>nd</sup> January, 2025. m/s. Waihenya Advocate commenced her submissions by providing a brief background of the matter. The Learned Counsel stated that before the Honourable Court was an Originating Summons dated 13<sup>th</sup> March, 2019, seeking the following orders: -

- a. ***THAT this application be certified as urgent and be heard ex parte in the first instance;***
- b. ***A declaration that the Applicant is entitled to the exclusive and unimpeded right of possession and occupation of 1.098Ha being all that piece of land known as Title No.CR.13827/1-Subdivision No. 1618 of Section 1 Mainland North, Mombasa County (the Suit Property);***
- c. ***THAT pending the hearing and determination of this application, the 1<sup>st</sup> Respondent, by himself, his employees, servants, tenants, and/or agents or otherwise howsoever be restrained from;***
  - i. ***Interfering in any manner whatsoever with the quiet and peaceable occupation, enjoyment, running, and operation of the Property;***
  - ii. ***Harassing, intimidating, threatening, or in any other way whatsoever interfering with the smooth running***

- and operation by the Plaintiff/Applicant, her employees, her tenants, servants, agents, assigns, or licensees, at the Property;**
- d. **THAT pending the hearing and determination of this Suit, the 1<sup>st</sup> Respondent, by himself, his employees, servants, tenants, and/or agents or otherwise howsoever be restrained from:**
- i. Interfering in any manner whatsoever with the quiet and peaceable occupation, enjoyment, running, and operation of the Property;**
  - ii. Harassing, intimidating, threatening, or in any other way whatsoever interfering with the smooth running and operation by the Plaintiff/Applicant, her employees, her tenants, servants, agents, assigns, or licensees, at the Property;**
- e. **An Order compelling the 2<sup>nd</sup> Respondent to remove the entries relating to the purported lease dated 2<sup>nd</sup> March 2018 to one Caffini Pierluigia for a term of 99 years from 1<sup>st</sup> June 1970 (a quarter portion carved out of 1618/1/MN) entered as an encumbrance and to reinstate the property to the status quo ante the fraudulent entries;**
- f. **Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant;**
- g. **Such other or further relief as this Honourable Court may deem appropriate.**
49. In the course of time, temporary conservative relief was granted by the Honourable court on 7<sup>th</sup> November 2019 in the following terms:
- a) THAT Judgement be and is herein stayed and that all orders emanating from that Judgement are hereby set aside. This matter be set down to be heard on merit.**
  - b) THAT the Applicant to move to the superior Court within 60 days hereof or earlier in order to have this file recalled and consolidated with No. ELC of 41/2019, further mentioned on 4<sup>th</sup> February 2020 for that purposes**
  - c) THAT cost in the cause or as will be determined in ELC of 41/2019**

50. The Learned Counsel submitted that the Applicant, was the absolute, rightful and lawful owner of the Suit Property, having inherited it from her late father, Joshua Oluoch Oyigo. The property was transmitted to her through a Deed of Assent on 11<sup>th</sup> March 2017, following the Grant of Probate issued in Succession Cause No. H.C.857 of 2005 in the High Court of Kenya at Nairobi.
51. The Applicant had sought the intervention of this Honourable Court following the unlawful registration of a lease over the Suit Property in favour of the 1<sup>st</sup> Respondent, Caffini Pierluigia, which had been entered into the Land Register in March 2018. The lease, which claimed to grant the 1<sup>st</sup> Respondent a term of 99 years from 1<sup>st</sup> June 1970, was both fraudulent and without any legal basis. Despite her efforts to resolve the matter with the Land Registrar and the 1<sup>st</sup> Respondent, the Applicant had suffered significant loss and interference with her right to peaceful possession of the Suit Property.
52. The Learned Counsel submitted for the Court to appreciate all facts and circumstances surrounding this matter, it was only prudent that the Court delved into the brief background of the same as related to the rival parties' claims, interests, and ownership of all that parcel of land known as CR 13823/1 of 13<sup>th</sup> August 2017, Sub - division No. 1618 of Section 1 Mainland North, Mombasa County, Survey Plan Number 86261.

53. Accordingly, the factual background as set out in the Applicant's Supporting Affidavit dated 1<sup>st</sup> November 2021, which was uncontested, was as follows:

- a) The Applicant was a resident of the United States and the sole heir to the estate of Joshua Oluoch Oyigo (deceased). The Suit Property, described as CR 13823/1, Sub - division No. 1618 of Section 1 Mainland North, Mombasa County, had been transmitted to her via a Deed of Assent on 10<sup>th</sup> March 2017, pursuant to a Grant issued in Succession Cause No. H.C. 857 of 2005 in the High Court of Kenya, Nairobi. The Applicant was the registered owner of the Suit Property, as evidenced by the Certificate of Grant and County Government Property Rate Statement marked as Exhibits "JMAO - 1a" and "JMAO - 1b" respectively.
- b) The Suit Property had originally been acquired by the Applicant's parents, Joshua Oluoch Oyigo (deceased) and Philomena Agatha Oyigo (deceased), by way of a Transfer dated 16<sup>th</sup> April 1973, as joint tenants, for a consideration of a sum of Kenya Shillings One Ninety Seven Thousand Five Hundred (Kshs. 197,500/-). A copy of the Provisional Title Deed to the Suit Property was annexed and marked as Exhibit "JMAO - 2".
- c) In April 2018, the Applicant had received calls and emails from her tenants and neighbours informing her that strangers had been visiting the property, claiming to be its owners. Concerned about the possibility of being dispossessed of her property, the Applicant had instructed her lawyers, the Law firm of Messrs. Oraro & Company Advocates, to place a caveat on the property. The caveat was registered, and a restriction under provision of Section 76 of the Land Registration Act, 2012

was placed on the title to prevent any further fraudulent dealings.

- d) Upon receiving a Certificate of Postal Search on 25<sup>th</sup> June 2018, the Applicant had discovered that the Lands Registrar had unlawfully registered a lease dated 2<sup>nd</sup> March 2018 to one Caffini Pierluigia for a term of 99 years, beginning 1st June 1970, as an encumbrance against her property. The details of the lease and the identity of Caffini Pierluigia were unknown to the Applicant.
- e) The Applicant maintained that she had full and uninterrupted possession of the Suit Property, which had a permanent wall and was under her exclusive occupation.
- f) To address the unlawful lease and protect her proprietary rights, the Applicant had filed a Notice of Motion on 13<sup>th</sup> March 2019, which led to the issuance of a temporary injunction by this Honourable Court. The relevant documents included the Notice of Motion, Supporting Affidavit, and Court Orders.
- g) The Applicant asserted that she had suffered significant loss and damage, including deprivation of the use and quiet enjoyment of the Suit Property, interference with her rights by unknown parties, and attempts by unscrupulous individuals to divest her of her rightful ownership.

54. In light of the foregoing, the Applicant prayed for the following reliefs:

- i. A declaration that the Applicant is entitled to exclusive possession and occupation of the Suit Property;***
- ii. An order directing the 2<sup>nd</sup> Respondent to remove the fraudulent lease in favor of Caffini Pierluigia and restore the property to its original status;***
- iii. An award for costs of the suit, along with interest; and***

***iv. Any other or further relief that the Court may deem appropriate.***

55. The Learned Counsel relied on the following five ( 5 ) issues for determination before this Honourable Court. Firstly, on whether the Applicant was entitled to exclusive ownership and possession of the suit property. The Learned Counsel submitted that the Applicant was the sole heir to the estate of the late Joshua Oluoch Oyigo, who, alongside his wife, Philemona Agatha Oyigo, acquired the Suit Property on 16<sup>th</sup> April 1973 through a Transfer. This acquisition was lawful, and the property was later transmitted to the Applicant via a Deed of Assent dated 10<sup>th</sup> March 2017, following the issuance of a Certificate of Grant in Succession Cause No. H.C. 857 of 2005 in the High Court of Kenya at Nairobi. The Applicant's legal right to the Suit Property is clear and absolute, and she holds it in full and exclusive possession, evidenced by the legal instruments provided.
56. It was pertinent to note that the ownership and right to possess the Suit Property have never been disputed by any of the previous owners or relevant authorities. As the lawful owner, the Applicant was entitled to occupy, use, and control the property without any interference. The property, located in Nyali, Mombasa County, has been under the Applicant's possession, and she has consistently asserted her rights over it. The Applicant has provided the necessary documents, including the Certificate of Grant and County Government

Property Rate Statements, which further demonstrate her ownership.

57. In April 2018, the Applicant had become aware of disturbing reports from tenants and neighbours regarding strangers who were claiming to be the owners of the Suit Property. Upon further investigation, the Applicant had discovered the unlawful registration of a lease in favour of the 1<sup>st</sup> Respondent, a person unknown to her. The lease had been for a 99-year term, starting from 1<sup>st</sup> June 1970, and had been registered unlawfully on 2<sup>nd</sup> March 2018. This fraudulent registration of the lease had sought to undermine the Applicant's rightful possession of the property.
58. The Applicant had acted promptly upon learning of the encumbrance by instructing her lawyers to place a caveat on the property. This had been done to safeguard her legal rights and prevent any further unauthorized claims. The Land Registrar had subsequently registered a restriction on the title under Section 76 of the Land Registration Act, 2012, which had been confirmed in the Certificate of Postal Search dated 25<sup>th</sup> June 2018. This restriction had been necessary to preserve the status quo and prevent further encroachment on the Applicant's rights while the matter was being addressed.
59. In light of the unlawful lease and ongoing interference with her possession, the Applicant had filed a Notice of Motion on 13<sup>th</sup> March 2019, seeking temporary injunctive relief. The Court had granted her the protection she sought, issuing an order to

restrain any further encroachment on her property. The Court's issuance of the injunction underscored the seriousness of the interference with the Applicant's exclusive right to the Suit Property.

60. The Learned Counsel submitted that the law was clear that a registered owner of land was entitled to exclusive ownership and possession unless their title was challenged or interfered with in a lawful manner. The provision of Section 24(a) of the Land Registration Act, 2012 stipulated that: -

**“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land with all rights and privileges belonging to or appurtenant thereto.”**

61. This provided that a registered proprietor was entitled to exclusive ownership and possession and the right to deal with the property, unless the title was challenged in accordance with the law. This principle had been reinforced in the case of **“Grace Mwakiria Mugambi - Versus - Philip Kimani [2018] eKLR”**, where J.O. Olola had held:

**“...that a registered owner enjoys absolute and exclusive possession of the property, subject only to any lawful challenge....”**

62. In the case at hand, the Applicant's title had not only been unchallenged but had also been supported by all necessary legal documentation, including the grant of letters of administration and the subsequent Deed of Assent. Her title to the property was thus superior and absolute, entitling her to unimpeded enjoyment and occupation.

63. Further, the lease in favour of the 1<sup>st</sup> Respondent had been registered fraudulently and without the Applicant's involvement and/or knowledge, making it voidable. The Applicant's right to protect her property had been further reinforced by the provision of Section 76 of the Land Registration Act, 2012, known as the registered caveat dated 3<sup>rd</sup> May 2018, which allowed for the registration of a restriction to safeguard the rights of the registered proprietor. This section had been invoked to place a restriction on the Suit Property to preserve the Applicant's legal rights while the matter was under investigation.
64. The Learned Counsel submitted that the Applicant had shown, beyond any doubt, that she was the rightful and exclusive owner and possessor of the Suit Property. The fraudulent lease registered in favour of the 1<sup>st</sup> Respondent ought to have been expunged from the records, as it had been done outside the parameters of the law, without the knowledge and involvement of the Applicant. This had been an unlawful attempt to undermine her legal rights. The injunction granted by this Court had provided crucial protection, ensuring that no further encroachment occurred.
65. The Applicant had taken all necessary and legal steps to protect her interests, and as the lawful owner, she was entitled to exclusive ownership and possession of the property. Therefore, any claims to the contrary ought to have been dismissed, and the Applicant ought to have been entitled

to the unimpeded enjoyment and occupation of the Suit Property. The Applicant humbly urged this Honourable Court to allow the orders sought, to uphold her rights to the Suit Property and to remove any encumbrances unlawfully affecting her ownership.

66. Secondly, on whether the 1<sup>st</sup> Respondent exercised due diligence in the transaction. The Learned Counsel averred that to address the above issue, the Applicant had further discussed the conduct of the 1<sup>st</sup> Respondent in the sale transaction effected. The Applicant had submitted to this Honourable Court that the registration done by the 1<sup>st</sup> Respondent had been fraudulent and without her knowledge and/or involvement. The 1<sup>st</sup> Respondent could not have claimed indefeasibility of title as this was defeated by the provision of Section 26 (1) of the Land Registration Act, 2012.

67. According to the Counsel, the Black's Law Dictionary defined "**due diligence**" to mean as follows:

**"The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. - Also termed reasonable diligence; common diligence."**

68. Further, in regard to the question of due diligence, the Applicant had urged this Honourable Court to be persuaded by the reasoning in the case of "**Esther Ndegi Njiru & another - Versus - Leonard Gatei [2014] eKLR**" where Justice Mutungi held that:

***“Whereas the law respects and upholds sanctity of title the law also provides for situations when title shall not be absolute and indefeasible. The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a Certificate of Search. Article 40 (6) of the Constitution removes protection of title to property that is found to have been unlawfully acquired. This provision of the constitution coupled with the provision of section 26 (1) (a) and (b) of the Land Registration Act in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as ‘grabbed public lands’ it is essential to endeavour to ascertain the history and/or root of the title.”***

69. The Sale Agreement annexed at pages 46 to 58 (Exhibit No. 10) had been improperly executed; first, it lacked a date and ought not to have been admitted as evidence in the suit. The said Sale Agreement purported to be in adherence to the Law Society Conditions of Sale 2015 but had failed to pay stamp duty for the sale agreement contrary to the provisions of Section 19 of the Stamp Duty Act. Condition 3.1.3 of the Law Society Conditions of Sale 2015 stated that unless otherwise specified, the Vendor’s Advocates shall present the Agreement to the Collector of Stamp Duty for assessment and payment of stamp duty, and the amount of duty shall be paid by the Purchaser.

70. The Counsel referred to the Stamp Duty Act, Section 19, stated:

**“Section 19 (1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no**

**instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except-**  
**(a) in criminal proceedings; and**  
**(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.”**

71. The 1<sup>st</sup> Respondent ought to have done a background check on the owner of the Suit Property, visited the property, enquired from neighbours and/or even established a history of the land. The 1<sup>st</sup> Respondent had only visited the property after the transaction was complete. There was ample evidence that the 1<sup>st</sup> Respondent had not conducted due diligence in the transaction and had been negligent and/or had been a part of the scheme to defraud the Applicant of her Suit Property. He had not made any effort to contact the owner of the said property, Ms. Jessica Adhiambo Oyigo. Further, evidence had been submitted that the documents pertaining to the alleged transfer of lease were forged and that the original instruments for the Suit Property throughout had been in the custody and care of Messrs. Oraro & Company Advocates.
72. The Applicant had duly testified that the Vendor's Advocate, Stephen Obaga Muriuki, in the sale agreement was unknown to her and, moreover, she had never met the 1<sup>st</sup> Respondent prior to this case.
73. Thirdly, on whether the Power of Attorney was valid and legal. The Learned Counsel submitted that the Applicant had submitted that the alleged Power of Attorney annexed at pages 59 to 62 (Exhibit No. 11) was a forgery. The Applicant

had never donated her Power of Attorney to anyone leave alone one Jared Onyango Omondi, who was unknown to her. The Donee was unknown to her. She had never met such a person. The document had been executed on 5<sup>th</sup> April 2017 and, as her passport demonstrated, she had not been in the country at that particular time, making it impossible for her to attest to the document.

74. The Learned Counsel urged this Honourable Court to adopt the finding by Honourable Justice Onyancha in the case of ***“Alberta Mae Gacci - Versus - Attorney General & 4 Others (2006) eKLR”*** when he had stated that:

***“Cursed should be the day any crook in the streets of Nairobi or any town in any jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed cursed would be the day when such would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that does not have even if it were for valuable consideration. For my part I would want to think that such a time when this comes, court would be called upon to defend such crook has not come and shall never come.”***

75. The alleged Power of Attorney allegedly given to one Jared Onyango had been fraudulent, and this was evident as the Applicant could not have appeared before the said Commissioner of Oaths, V. Nzioki, the reason being that she was a resident of the United States of America and had not been in the country at that particular time. Annexed as proof was her passport at pages 63 to 64 (Exhibit No. 12). It was also self-evident that the Applicant’s identification details as

stated in the Power of Attorney had been a clear forgery and not authentic. At page 61 and the copy of the executed pages of the Power of Attorney at page 59, the Applicant's Identification Number was indicated as 20683592.

76. The Learned Counsel further opined that it was also clear that the Applicant had not had the benefit of the funds allegedly paid. It was self-evident that the money had been paid to one Stephen Obaga Muriuki, who was unknown to the Applicant. The onus thus remained on the 1<sup>st</sup> Respondent to prove that the Applicant had received the money.
77. Fourthly, on whether the lease entry in the register of the suit property should be rectified. The Learned Counsel submitted that it was evident that the registration of lease to the 1<sup>st</sup> Respondent had been fraudulently acquired and the documents that had allegedly been used to convey the title had been forged. The Court had been empowered by the Constitution of Kenya, 2010, Article 40 (6), and the Land Registration Act, 2012, to rectify a title fraudulently obtained.
78. The provision of Article 40 (6) of the Constitution of Kenya, 2010, stated that the right to property did not extend to any property that had been found to have been unlawfully acquired. The provision of Section 80 of the Land Registration Act, 2012, granted the Court the power to rectify the register. The Court could order rectification of the register by directing that any registration be cancelled or amended where it was

satisfied that any registration (other than the first registration) had been obtained, made, or omitted by fraud or mistake.

79. The Learned Counsel urged this Honourable Court to adopt the case of ***“Elijah Makeri Nyange - Versus - Stephen Mungai Njuguna & Another (2013) eKLR”*** where Justice Sila Munyao held that:

***“The evidence in this case puts no one to doubt that the title of the 1<sup>st</sup> Defendant was obtained unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1<sup>st</sup> Defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1st Defendant and the registration as proprietor of the suit land. The Plaintiff should be registered the owner of the suit land. It is regretful that the 1<sup>st</sup> Defendant was snared by the scheme perpetrated by the 2<sup>nd</sup> Defendant. I sympathize with him but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land.”***

80. The Learned Counsel further urged the Court to adopt the case of ***“Evanson Wambugu Gachugi - Versus - Simon Wainaina Gatwiki & 2 Others [2014] eKLR”*** when the Court of Appeal Justices had stated regarding forged documents:

***“On this issue of the validity of the transfer documents, we cannot fault the learned judge for the conclusion that he had made regarding the legality of the instruments of transfer that dispossessed the estate of the deceased of the suit land. On the other issue of whether the Judge could have ordered the transfer to the name of the 1<sup>st</sup> Respondent. The Judge having found collusion on the part of the Appellant and the land registrar in the manner in which the transfer was effected under Section 143 (1) of the repealed Registered Land Act, the court is empowered to order the rectification of the register by directing a registration to be***

***cancelled if it was obtained by fraud or mistake. There is also no dispute that the 1<sup>st</sup> Respondent is the administrator of the estate of the deceased...***

81. According to the Learned Counsel, the Applicant had lost her title. It had been gazetted vide Gazette Notice No. 7 of 6th January 2017. She had been issued with a Provisional Certificate of Title in year 2016. The original instruments of the Suit Property were still in the custody of Messrs. Oraro & Company Advocates. The Applicant had again urged this Honourable Court to adopt the case of ***“Evanson Wambugu Gachugi - Versus - Simon Wainaina Gatwiki & 2 Others (Supra)”*** when the Court of Appeal Justices had held as follows:

***“Moreover, the original title of the suit property was with the 1st Respondent. It was never surrendered to the lands office in support of the transfer as the original must be surrendered for cancellation before a new title is issued. In the event that the original transfer was unavailable, it was incumbent upon the land registrar to publicize its loss in the Kenya Gazette which was not done.”***

82. Fourthly, on whether the Applicant was entitled to the reliefs sought, the Learned Counsel submitted that the Applicant had satisfied the three requirements for the granting of the reliefs sought as established in the case of:- ***“Giella - Versus - Cassman Brown & Company Limited [1973] E.A. 358”***. It had been held that for the Court to grant injunctive reliefs, the Applicant must have satisfied the following:

- a. ***The Applicant must have shown that she had a prima facie case with a probability of success against the Respondent.***
- b. ***The Applicant must have demonstrated that unless the order was granted, she would have suffered irreparable harm which could not adequately have been compensated by an award of damages.***

**c. That if the Court had been in doubt as to (a) and (b) above, the Court would have determined the application on a balance of convenience**

83. The Applicant had established a prima facie case with a probability of success by demonstrating that she was the rightful and exclusive owner of the Suit Property. This had been supported by evidence of fraud and negligence on the part of the 1<sup>st</sup> Respondent in obtaining the lease without the Applicant's knowledge or consent. The fraudulent lease and the subsequent actions of the 1<sup>st</sup> Respondent in encroaching upon the Suit Property had clearly violated the Applicant's property rights. Additionally, the Applicant had taken consistent steps to defend her ownership, including filing a caveat and seeking legal redress.
84. The Applicant had also demonstrated that she would have suffered irreparable harm if the injunctive relief had not been granted. The loss of ownership and possession of the Suit Property could not have been adequately compensated by an award of damages. The property held intrinsic and unique value to the Applicant, and its unlawful encroachment had disrupted her rights and use of the property, causing harm that monetary compensation could not have remedied.
85. If the Court had entertained any doubt, the balance of convenience had clearly favoured the Applicant. She had acted diligently to protect her rights and prevent further harm to her property. Allowing the fraudulent lease to stand would have unjustly perpetuated the violation of her ownership

rights while benefiting the wrongful actions of the 1<sup>st</sup> Respondent.

86. Furthermore, the Applicant's claim for rectification of the register had been well-founded under the provision of In , 2012, which empowered this Honourable Court to cancel any registration obtained through fraud or mistake. The fraudulent and forged documents presented by the 1<sup>st</sup> Respondent had been clear grounds for rectification of the register to reflect the Applicant's rightful ownership of the Suit Property.
87. In light of the above, the Applicant had satisfied all the requirements for the reliefs sought. These included rectification of the register to remove the fraudulent lease, a declaration confirming her exclusive ownership and right to possession, and any other necessary orders to protect her property from further unlawful interference. The Applicant had respectfully urged this Honourable Court to uphold the sanctity of property rights and grant her the appropriate reliefs.
88. In conclusion, the Learned Counsel submitted that the Applicant had presented a compelling case demonstrating that the fraudulent lease obtained by the 1<sup>st</sup> Respondent had been unlawful and voidable. The evidence had shown that the Applicant was the rightful and exclusive owner of the Suit Property, and her efforts to protect her rights had been in good faith. Given the fraudulent nature of the registration and the encroachment on her property, the Applicant had been

entitled to the reliefs sought, including the rectification of the register and the restoration of her legal title to the Suit Property. The Applicant had therefore respectfully urged this Honourable Court to grant her prayers and provide the necessary relief to uphold her rightful ownership and protect her property rights.

89. In light of the above, the Learned Counsel concluded the submissions by stating, the Applicant humbly prayed that this Honourable Court:

- a) Declares that the Applicant is the lawful and absolute proprietor of the Suit Property known as Subdivision No. 1618 of Section 1 Mainland North, Mombasa County.**
- b) Orders that the fraudulent lease registered in favor of the 1<sup>st</sup> Respondent on 2<sup>nd</sup> March 2018 be canceled and expunged from the property records maintained by the Land Registrar.**
- c) Issues a permanent injunction restraining the Respondents, their agents, servants, employees, or any other person acting on their behalf from entering, occupying, leasing, selling, or otherwise interfering with the Suit Property.**
- d) Confirms the restriction placed on the Suit Property under Section 76 of the Land Registration Act, 2012, until such time as the Applicant's rights and title are conclusively protected and the fraudulent lease fully expunged.**
- e) Grants an order for the Respondents or any other persons unlawfully occupying the Suit Property to vacate it within a period determined by the Court, failing which an eviction order be issued.**
- f) Award the Costs and interest of this suit and any incidental applications to the Applicant.**
- g) Any other reliefs as this Honourable Court may deem fit and just to grant in the interest of justice.**

**B. The Written Submissions by the Defendant/Respondent.**

90. The 1<sup>st</sup> Defendant through the Law firm of Messrs. Ahmednassir Abdullahi Advocates LLP filed their written submissions dated 20<sup>th</sup> March, 2025. M/s. Asli Osman Advocate submitted that these submissions pertained to the originating summons dated 13<sup>th</sup> March, 2019 seeking a raft of orders including: -

**a. Spent;**

**b. An order compelling the 2<sup>nd</sup> Defendant to remove the entries relating to the purported lease dated 2<sup>nd</sup> March 2018 to one Caffini Pierluigia for a term of 99 years from 1<sup>st</sup> June 1970 (a quarter portion carved out of 1618/1/) entered as an encumbrance and to reinstate the property to the status quo ante the fraudulent entries;**

**c. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant; and,**

**d. Such other or further relief as this Honourable Court may deem appropriate**

91. On the factual background, the Learned Counsel submitted that on or about 5<sup>th</sup> March 2018 the 1<sup>st</sup> Defendant entered into an agreement for the sale and purchase of the parcel of land known as C.R.13827/1 SUB - DIVISION NO.1618 of SECTION 1 MAINLAND NORTH MOMBASA COUNTY (herein referred to as "the Suit Property"). The vendor one fared Omondi Onvaneo was a holder of a Power of Attorney dated 5<sup>th</sup> April 2017 wherein the Plaintiff donated to him the irrevocable power "to executing and acknowledging documents in respect of selling of parcel of land sub - division L.R Number 1618, registered in the Mombasa Registry of Land at Mombasa as C.R.13827."

92. The purchase price was a sum of Kenya Shillings Five Million (Kshs. 5,000,000/) less a sum of Kenya Shillings Two Seventy Three Thousand Nine Hundred (Kshs. 273,900/=) being the outstanding rate to be paid by the Defendant and that the rates arrears which amount was deductible from the purchase price. On or about 3<sup>rd</sup> March 2018 the 1<sup>st</sup> Defendant executed a Lease Agreement in respect to the suit property for the unexpired residue of the term of Ninety-Nine (99) years from 1<sup>st</sup> June 1970.

93. According to the Learned Counsel, the 1<sup>st</sup> Defendant paid a sum of Kenya Shillings Four Million Seven Nineteen Thousand Five Seventy Eight (Kshs.4,719,578.00/=) being the agreed purchase price less the deductions on or about 8<sup>th</sup> March 2018. On or about 23<sup>rd</sup> March 2018 the 1<sup>st</sup> Defendant paid the outstanding sum of Kenya Shillings Two Seventy Three Thousand Nine Twenty Two Hundred (Kshs. 273,922.00/=) thereby settling the outstanding rates and thus marking the full settlement of the purchase price. The transaction was duly registered at the Ministry of Lands and a duly registered Lease Agreement was issued in favour of the 1<sup>st</sup> Defendant which was confirmed by the post registration search. Subsequently, a Certificate of Title was issued in favour of the 1<sup>st</sup> Defendant.

94. According to the Learned Counsel, the 1<sup>st</sup> Defendant was thus not a Tenant but a land owner due to the provision of Section 54 (5) of the Land Registration Act of Kenya which

confers ownership to persons holding long term leases. The 1<sup>st</sup> Defendant asserts that despite having complied with the terms of the Agreement and having obtained a valid Lease from Land Titles Registry at Mombasa the Plaintiff, her servants, agents or employees have openly and deliberately breached the Agreement by trespassing onto and declining to give vacant possession of the suit property.

95. As a result of this breach the 1<sup>st</sup> Defendant instituted a suit for vacant possession of the property in the case of ***“Mombasa CM ELC No. 20 of 2018 Caffini Pierluigia - Versus - Jessica Margaret Adhiambo Oyigo (through her attorney Jared Omondi Onyango)”*** which suit was successful, and Decree issued declaring the 1<sup>st</sup> Defendant as the legal owner of the property and requiring the Plaintiff to deliver vacant possession of the suit property. This was a regular Judgment that proceeded for formal proof hearing. The Plaintiff being dissatisfied with the decision of the Honourable Court preferred to institute this suit as a fresh matter as opposed to preferring to an appeal or review. She claimed that she did not know Jared Omondi and purported that she was away at the time when the Power of Attorney was executed. They demonstrated that the same is a plain lie later on in these submissions.

96. The Learned Counsel relied on the following six ( 6 ) issues for determination in respect to the matter. Firstly, on whether the instant suit was res judicata. The Learned Counsel submitted that the doctrine of Res Judicata in Kenya

is established by statute in Section 7 of the Civil Procedure Act, Cap. 21, Laws of Kenya, which provides as follows:-

**“Res Judicata No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. Explanation. — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it. Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”**

97. According to the Learned Counsel, the elements of res judicata can be said to be the following:-

- a. **The matter in issue is also directly and substantially in issue in the previously instituted suit or proceedings;**
- b. **The previous suit is between the same parties or between parties under whom they or any of them claim, litigating under the same title;**

- c. Such suit or proceeding or issues therein was heard and finally determined in the former suit; and
- d. The Court that formerly heard and determine the issues was competent to try the subsequent suit or the suit in which the issue is raised

98. The Learned Counsel relied on the case of ***“ET - Versus - Attornev General & Another f2012) eKLR”***, where the court said the following on the issue:

***“52. The general principle of res-judicata is captured in section 7 of the Civil Procedure Act which provides that:- 7. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court. 53. For the operation of the doctrine of res judicata first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of Karia and Another v The Attorney General and Others [2005] 1 EA 83, 89).”***

99. The Honourable court in the case of ***“ET - Versus - Attornev General & Another (Supra)”*** explained the rational behind the operation of the doctrine of res judicata as follows:-

***“The rationale behind the said doctrine of res judicata and issue estoppel is that if the controversy in issue is finally settled or determined or decided by the court, it cannot be re-opened. The rule of res judicata is based on two principles; there must be an end to litigation and the party should not be vexed twice over the same cause.”***

100. According to the Learned Counsel to put the salient facts into perspective, the former suit being **“Mombasa CM ELC No.20 of 2018 Caffini Pierluiei - Versus - Jessica Margaret Adhiambo through her Attorney Jared Omondi Onyango)”** firmly determined the issue of ownership of the suit property and declared the 1<sup>st</sup> Defendant to be the legal owner of the suit property and required the Plaintiff to deliver vacant possession of the same. Contrasting the instant suit is predicated on the ownership of the suit property an issue that has been determined prior. As regards, to the third limb of parties under whom they or any of them claim, litigating under the same title, the Counsel humbly submit that the party in the suit was a party in the former suit

101. They further brought to the attention of this Honourable Court that the only new Defendant added in this suit was the County Land Registrar/Land Registrar Mombasa County. Thus we refer this Honourable Court to the case of:- **“Omondi - Versus - National Bank of Kenya and Others [2001] EA 177”** the court held that:-

**“parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu - Versus - Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata ”**

102. In the case of:- ***“Katiba Institute - Versus - President of Republic of Kenya & 2 Others, Judicial Service Commission & 3 others (Interested Parties) (Petition 106 of 2020) (2020) KEHC 92\_26 (KLR) (Constitutional and Human Rights (17 December 2020) (Ruling)”*** warned that the courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of actions so as to seek the same remedy before the court.
103. According to the Learned Counsel, the fundamental issue on the ownership of the suit property was determined holistically by the Court in the former suit being ***“Mombasa CM ELC No. 20 of 2018 Caffini Pierluigi - Versus - Jessica Margaret Adhiambo Oyigo (through her attorney Jared Omondi Onyango”*** Thus, this court should avoid hearing and determining the issue rendered by a Court of concurrent jurisdiction as the Plaintiff is orchestrating a gross abuse of court process by galloping from one court to another fishing for a convenient verdict.
104. Secondly, on whether the Judgment can be overturned by an application. The Learned Counsel argued that it is trite law that a valid Judgment of a court unless overturned by an appellate court remains a Judgment of the court and enforceable. The Honourable Court gave Judgment dated 3<sup>rd</sup> April, 2019 in favour of the 1<sup>st</sup> Defendant in the case of ***“Mombasa CM ELC No. 20 of 2018 Caffini Pierluigi - Versus - Jessica Margaret Adhiambo Oyigo (through her attorney Jared Omondi Onyango”***, declaring the 1<sup>st</sup> Defendant as the legal owner of the property and requiring that the Plaintiff deliver

vacant possession. The Plaintiff being dissatisfied with the decision of the court had two avenues that she could discover either appeal or go for review of the said decision. However, the Plaintiff decided to make an application to overturn the judgment of the court.

105. According to the Learned Counsel, the question that this court should address itself with can an inter-parties judgement be overturned by an Application instead of an appeal or a review.

106. Thirdly, on whether the Power of Attorney was valid. The Learned Counsel averred that a power of attorney has been defined by the **Black's Law Dictionary (8<sup>th</sup> Edition 2004)** as:-

**“ an instrument granting someone authority to act as agent or attorney-in- fact for the grantor. An ordinary power of attorney is revocable and automatically terminates upon the death or incapacity of the principal.”**

**107.** In a Special Power of Attorney the donor limits that powers of a donee to one specific matter. An irrevocable special power of attorney does not lapse, it is continuing and cannot be revoked. The irrevocable special power of attorney in question dated 5<sup>th</sup> April 2017 was specific to the suit property. They submitted that the Power of Attorney executed on 5<sup>th</sup> April, 2017 was valid as the Plaintiff donated to Jared Omondi Onyango irrevocable power **“to executing and acknowledging documents in respect of selling of parcel of land subdivision L.R Number 1618, registered in the Mombasa Registry of Land at Mombasa as C.R.13827.**

108. The Learned Counsel placed reliance to the case of “**CCB - Versus - MIB & Another [2014] eKLR**”, where the court held that:-

***“An extract from the free Law Library describes an irrevocable Power of Attorney as a Power of Attorney that cannot be revoked by the principal. A Power of Attorney lapses for legal reasons (by operation of law) such as for incapacity or death. An irrevocable Power of Attorney will not lapse because it is continuing (enduring) and irrevocable, cannot be cancelled.”***

109. It was their case that the Plaintiff executed an irrevocable special Power of Attorney in favour of Jared Omondi Onyango on 5<sup>th</sup> April 2017. The donated power was irrevocable and the donee was given the powers to represent the donor in respect of parcel land subdivision L.R Number 1618 **registered** in the Mombasa registry at Mombasa as C.R.12827.

110. They submitted that the document was properly executed as the Plaintiff duly signed and executed it as it is evidence that the signature duly signed on the power of attorney is similar to her signature on the Supporting Affidavit dated 1<sup>st</sup> November, 2021, as well as, all other documents on record bearing the Plaintiffs signature. They further submitted that the Plaintiff allegations that she was not in the Country at the time the Power of Attorney was executed making it impossible for her to attest to the same is part of a narration that the Plaintiff wants us to believe and buy it. There is no

evidence she was away; in fact no passport was produced by the Plaintiff to show this.

111. They submitted that the Power of Attorney dated 5<sup>th</sup> April, 2017 was a valid Power of Attorney as it was properly signed, executed, attested and registered conferring irrevocable power to Jared Onyango to act on her behalf in relation to the suit property. Once a Power of Attorney is registered and it bears stamps of proof of payment of stamp duty, the law deems it valid and enforceable not unless the same is challenged by a forensic document examination report showing the signature of the donor is different from her known signatures.
112. Further, during cross examination of the Plaintiff by the 1<sup>st</sup> Defendant counsel, the Plaintiff admitted that she has never reported the alleged forgery of her signature, neither has the Plaintiff caused a forensic document examination of the signature on the power of attorney to show it is not hers despite the signature being same to all her signatures on record. The mere denial of the signature cannot suffice where the document is duly registered.
113. Fourthly, on whether the Plaintiff has proven fraud, according to the **Black's law dictionary**, fraud is defined as follows: -

**“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with**

design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

114. It is trite law that whoever alleges must prove. The Court of Appeal encapsulated the principle of *'whoever asserts must prove* in the case of: ***“Jennifer Nyambura Kamau - Versus - Humphrey Mbaka Nandi [2013] eKLR”*** in the following words: -

***“section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”***

115. It is trite law that the first principle of the allegation of fraud is that it must not only be pleaded and particularized but strictly proven. This position was affirmed by the Court of Appeal in the case of ***“Viiav Moriaria - Versus - Nansineh Madhusineh Darbar & Another [2000] eKLR”*** where the Court stated as follows:-

***“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly***

***alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”***

116. This position was reiterated in ***“Belmont Finance Corporation Ltd - Versus - Williams Furniture Ltd”*** where Buckley L.J said:-

***“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity.”***

117. The Plaintiff did not plead nor particularize fraud in their pleadings thus fraud could not be inferred from the facts. The second principle in fraud allegation is that the burden of proof is on the person alleging fraud. This position was upheld in ***“Ndolo - Versus - Ndolo [2008] 1KLR [G &F] 742”*** where the court stated that:-

***“We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”***

118. In the case of ***“Christopher Ndaru Kaeina - Versus - Esther Mbandi Kagina & Another [2016] eKLR”*** the court pronounced itself on the position as follows: -

***“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In***

***particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.”***

119. Further the case of ***“Urmila w/o Mahendra Shah - Versus - Barclays Bank International Ltd & Another [1979] eKLR”***, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it. Keeping reliance on the above authorities the onus to prove that indeed there is fraud lies with the Plaintiff and sufficient evidence ought to be brought in to prove the allegation. They submitted that the Plaintiff has not brought before this court sufficient evidence to prove the allegations of fraud that she intends to explore. The third principle is that the burden of proof of allegation fraud is higher than that required in civil cases, that of proof on a balance of probabilities; and lower than that required in criminal case that is beyond reasonable doubt.

120. This position was upheld in the Court of Appeal in the case of ***“Kinyanjui Kamau - Versus - George Kamau [2015] eKLR”***, where the court expressed itself as follows;-

***“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo [2008] 1 KLR (G & F) 742 wherein the Court stated that: “We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal***

***cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”***

121. To reiterate this position they further kept reliance in the case of ***“Vijay Morharia - Versus - Nansien Madhusine Darbard & Another (Supra)”*** where the court stated that:

***“fraud must be specifically pleaded and proven and that as was held by the Court in Central Bank of Kenya vs Trust Bank Limited & 4 Others [1996] eKLR, the burden of proof in fraud cases is heavier than in an ordinary civil case.”***

122. It was common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition at page 427:**

**“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).**

**The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence - Versus - Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (IDavy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”. See Insurance Company of East Africa - Versus - The**

**Attorney General & 3 Others HCCC 135/1998. Whether there was fraud is, however, a matter of evidence.**

123. The same position is reiterated in the case of ***“Dav - Versus - Garrette (1878) 7 ch.473 at Pg 489”*** as cited in ***“Mike Maina Kamau - Versus - Attorney General [2017] eKLR”***, the Court held that:-

***“In the common law courts, no rule was more clearly settled than that fraud must be distinctly proved and that it was not allowable to leave fraud to be inferred from the facts...”***

124. The Plaintiff herein has not adduced any evidence to support its allegations of fraud as is required by the case of ***“Davy - Versus - Garrette (supra)”***. In the case of ***“Eunice Grace Njambi Kamau & another - Versus - Attorney General & 5 others [2013] eKLR”*** the court observed and held as follows:-

***“Having regard to the interpretation that the courts have variously given to Article 40 of the Constitution I take the view that Article 40 of the Constitution upholds and protects the sanctity of property and that the primary consideration is that the title to the property is lawfully obtained. The only instance where title to property cannot be protected is where it is shown that the title was unlawfully acquired and/or procured such that under article 40(6) such title cannot be protected. I agree with Honourable Justice Majanja's observation in the case of ISAAC GATHUNGU WANJOHI & ANOTHER - VERSUS - ATTORNEY GENERAL & 6 OTHERS [2012] eKLR when he stated at paragraph 42 thus:-***

***“Article 40 must read as a whole so that protections afforded by Article 40 which protect the right to property must be read to exclude property found to be unlawfully acquired under Article 40(6). This requirement is an extension of the fact that the constitution protects higher values which are to be found in preamble to the constitution and Article 10. Values such as human rights and social justice cannot***

**countenance a situation where the constitution is used to rubberstamp what is in effect unlawful”.**

**...In my view the determination whether or not a title is illegal or unlawful has to take into account the circumstances and the process through which the title was obtained and/or acquired and provided the title is regularly issued by the duly authorized officers entitled to do so by the government, it is my opinion that such a title can only be impugned under Article 40(6) of the Constitution by it being established that the title was unlawfully obtained or acquired by the person shown to be registered as the owner. The doctrine of the sanctity of title is anchored on the premise that a registered owner of land who holds a certificate of title that is duly registered is prima facie the owner of that property and the title he holds is indefeasible unless the title is shown to have been unlawfully acquired and/or procured. My understanding is that for the title of a registered owner to be impugned on account of fraud such an owner must have had knowledge that the title was fraudulently obtained or procured and/or the owner was party to the fraud.**

**...**

**In the present petition no evidence of fraud or any misrepresentation has been tendered to link the petitioners with any fraud or misrepresentation in regard to the acquisition of the subject title. Equally no evidence has been put forward to suggest that acquisition of the title was illegally procured. It is my view that the Respondents would need to demonstrate and establish the acts by the petitioners that would constitute illegality in the acquisition of the title. The petitioners claim they are bonafide purchasers of the suit property without any notice of any defect in title. The petitioners have cited the case of **FLECTCHER VS. PECK 10 U.S 87 (1810)** to illustrate how other jurisdictions have handled the issue of sanctity of title and the plight of innocent third parties. In the said **FLETCHER VS. PECK** case **Supra Marshall J** had this to say:-**

***“If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles which according to every legal test, are perfect are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him.***

***He has paid money for a title good at law, he is innocent whatever may be the guilt of others and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and intercourse between man and man would be very seriously obstructed if this principle be overturned.”***

125. Additionally, where a party alleges illegality, they must then follow the due process to prove so as was held in ***“Isaac Gathungu Wanjohi & Another - Versus - Attorney General & 6 Others (2012) eKLR”*** as follows:-

***“Where the state contended a property was acquired illegally, the state must follow due process to establish the illegality”.***

126. In this matter according to the Learned Counsel, it was upon the Plaintiff to adduce evidence of the allegations of fraud that she has asserted, which allegations have not been proved as per the required standard of proof. In support of the Plaintiffs sweeping allegation of fraud on the part of the 1<sup>st</sup> Defendant, the Plaintiff holds out the following:

- (a) The Plaintiffs main contention was that she did not know Jared Omondi Onyango and never authorised anyone to sell the suit property;
- (b) The Plaintiff did not sign the Power of Attorney;
- (c) The Plaintiff was not around during execution of the Power of Attorney;
- (d) She was notified by her neighbours and Care Taker that someone laid claim to her property;
- (e) To secure her interests in the suit property, the Plaintiff employed security guards to man the suit property;
- (f) The Plaintiff never received any proceeds of the sale;

127. Mr. Jared Omondi Onyango was the holder of a registered Power of Attorney from the Plaintiff authorising him to sell the suit property. This is normal conveyancing practice, especially where the client travels out of Kenya frequently. The Plaintiff's signature appearing on the Power of Attorney was similar to all her signatures on record ranging from her Supporting Affidavit, the agreement with Texas Alarms (K) Limited, the Plaintiffs Application for a provisional title, etc.

128. According to the Learned Counsel it was instructive to note that the Plaintiff never produced a copy of her passport nor National identification card. These copies were not in her Supporting Affidavit sworn 1<sup>st</sup> November 2021 in support of the Originating Summons before this Court. The same also did not appear in her documents filed in Mombasa Chief Magistrate Court ELC Case no. 20 of 2018. They were also not in the Plaintiffs Supplementary List of Documents. However, she had attempted to introduce them at submissions stage. They ought to be disregarded with the contempt it deserves.

Even if they were to peruse the copy of the Plaintiffs passport illegally introduced during submissions stage, one must note the following:

- a) The Plaintiff entered Kenya on 7<sup>th</sup> October 2012. There was no corresponding stamp when she left;
- b) The Plaintiff entered Kenya on 14<sup>th</sup> February 2016 and left on 23<sup>rd</sup> February 2016;
- c) The Plaintiff entered Kenya on 23<sup>rd</sup> February 2018 and left on 8<sup>th</sup> March 2018;
- d) The Plaintiff entered Kenya on 16<sup>th</sup> November 2018 and left on 26<sup>th</sup> November 2018;

129. From the above passport being extrinsic evidence, it appeared she may not have been around to sign the Power of Attorney on 5<sup>th</sup> April 2017. However, the Plaintiff has produced documents bearing her original signature executed by her on dates that she was also not in Kenya according to her passport as follows:-

- a) The Plaintiff applied for a provisional title towards the end of December 2016 (see supporting receipts at page 24 to 26 of the Plaintiff's Supplementary List of Documents) which application bore her signature despite the fact she was not around according to the copy of the Plaintiffs carefully selected passport. How did she sign an application to be submitted at Ministry of Lands in original form yet she was not around?
- b) A copy of a Deed of Assent signed by the Plaintiff dated 8<sup>th</sup> March 2017;
- c) The Plaintiff produced an application for guarding services by the Plaintiff addressed to Texas Alarms (K) Limited signed by the Plaintiff on September 2018 despite her passport showing she was not in Kenya. See

annexture 5a of her Supporting Affidavit sworn 1<sup>st</sup> August 2021;

d) The Plaintiff produced an agreement between herself and Texas Alarms (K) Limited signed by the Plaintiff on 31<sup>st</sup> August 2018 despite her passport showing she was not in Kenya. See annexture 5b of her Supporting Affidavit sworn 1<sup>st</sup> August 2021;

130. It was clear that this illegal and new evidence, being a copy of the passport and national identification card, were carefully selected to create an impression that she was not around. The Plaintiffs counsel could not explain this anomaly on behalf of the Plaintiff in submission. In addition to the foregoing, during cross examination of the Plaintiff by the 1<sup>st</sup> Defendant counsel, the Plaintiff could not show sample emails from her alleged neighbors that there was someone at the property who was on site for allegedly a very long time.

131. During the site visit on 7<sup>th</sup> February 2025, they were shown an alleged care taker- where was the care taker when the 1<sup>st</sup> Defendant visited the cite? Where was the care taker when the 1<sup>st</sup> Defendant placed a security guard on his property (the suit property)? Where was the evidence that the Plaintiff was alerted by neighbours/ or proof that anyone alerted her. The care taker never testified, neither did any neighbour testify. If anything, there are no guards on the suit property. During the site visit on 7<sup>th</sup> February 2025, guards were on a separate portion of the property and not the suit property. As such, the averments at paragraph 10 of the Plaintiffs Supporting Affidavit sworn on 13<sup>th</sup> March 2019 is a plain lie used to

induce the court to grant interim orders? If Plaintiff could lie on oath then, what assures the court she is not lying now?

132. The issue of receipt of funds was irrelevant, once the consideration for the purchase of the suit property was sent to the Plaintiffs advocates on record-Messrs. Stephen Obaga Muriuki Advocate (see Clause 1.1 (i) of the Agreement for Sale), the Plaintiff could only claim proceeds from her advocates. In a show of desperation, at paragraph 15 of the Plaintiffs written submissions, the Plaintiff has attempted to invalidate the Agreement for Sale of the suit property between the Plaintiffs registered holder of a Power of Attorney and the 1<sup>st</sup> Defendant by alleging that no stamp duty was paid for as regards the agreement for sale. The citation of section 19 of the Stamp Duty Act is misleading and inapplicable to the circumstances herein. section 19 (1) (b) applies where a collector of stamp duty is involved. The Plaintiff is not a collector of stamp duty. The Agreement for Sale was produced by consent of parties and the Plaintiff cannot deny this fact. The elements of a valid contract such as the instant agreement for sale are offer, acceptance and consideration. They prayed that this Honourable Court does find that there is no proof of fraud.

133. Fifthly, on whether the 1<sup>st</sup> Defendant exercised due diligence in the transaction. The Learned Counsel submitted that the 1<sup>st</sup> Defendant did in fact conduct and undertake in proper due diligence in regard to the suit property prior to entering into

the Sale Agreement with the vendor. The chain of transmission from power of attorney and nobody else. The 1<sup>st</sup> Defendant did not allege that he bought from the Plaintiffs parents nor from any other person. As such, this great fuss about site visits, talking to neighbours would only take centre stage if a third party sold the property to the 1<sup>st</sup> Defendant and the third party was not a holder of a power of attorney from the Plaintiff authorizing him/her to sell the suit property on behalf of the Plaintiff. If anything, the special power of attorney before this court was donated by the Plaintiff and no one else.

134. In the due diligence the 1<sup>st</sup> Defendant finding were the suit property was in fact the property of the Plaintiff and satisfied himself that the chain of ownership was not in question. The 1<sup>st</sup> Defendant hired an advocate for this purpose-due diligence. They submitted that having satisfied himself that the suit property was under the Plaintiffs name and the transaction was to be done through her attorney the 1<sup>st</sup> Defendant sought to enter into a sale agreement for the purchase of the suit property.

135. The Learned Counsel on the validity of the sale agreement referred the Court on the ingredients for a valid contract of sale of land are stipulated in Section 3(3) of the Law of Contract Act which states: -

**“(3)No suit shall be brought upon a contract for the disposition of an interest in land unless—(a)the contract upon which the suit is founded—(i) is in writing;(ii)is signed**

**by all the parties thereto; and(b)the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”**

136. The above provision is further reiterated under the provision of Section 38 of the Land Act which state as follows: -

**“38.(1)No suit shall be brought upon a contract for the disposition of an interest in land unless—(a)the contract upon which the suit is founded— (i)is in writing;(ii)is signed by all the parties thereto; and(b)the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.”**

137. The Court of Appeal in the case of ***“Jane Catherine Karani - Versus - Daniel Mureithi Wachira”*** upheld this position where it stated that: -

***“It is clear from the reading of section 3(3) of the Law of Contract act that the signature of each party is required to be attested by a witness who was present during the execution of the agreement. We have perused the agreement and we find that it is only the appellants signature that was attested by her husband. This was clearly contrary to Section 3 (3) of the law of contract.”***

138. They further made reference to the case of ***“Nelson Kivuvani - Versus - Yuda Komora & Another, Nairobi HCCC No.956 of 1991”***, where the Court in addressing the issue on validity of the sale agreement held that:-

***“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price***

***and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract". All the above ingredients are met in the instant Sale Agreement entered between the Plaintiff and the Defendant and therefore the Sale Agreement between the two is valid."***

139. Keeping reliance on the above authorities they submitted that the Agreement for Sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. They further submitted that the sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant satisfied all the formal requirements of a valid contract for sale of land. A look at the said sale agreement confirms that the same is a valid sale agreement and enforceable by the parties. In regards to the issue of the date of the Sale Agreement we submit that the agreement was dated by the last person who executed it. The date the Sale Agreement was executed was 5<sup>th</sup> March 2018 as such the date of the Sale Agreement is 5<sup>th</sup> March 2018. Annexed as proof of the same is the Sale Agreement at pages (Exhibit 10).
140. They further submitted that all the conditions were met in regards to the purchase of the subdivision. Payment of stamp duty was duly made by the 1<sup>st</sup> Defendant, and the Lease has the stamps marks proof of payment of stamp duty annexed as proof is the Lease at page (Exhibit 10.)

141. The transaction being lawful it follows that the interest in the suit property is vested to the 1<sup>st</sup> Defendant upon registration. This is in accordance with Section 24 of the Land registration Act.
142. According to the Learned Counsel, it is trite law that registration of a person as the owner of the land and a certificate of title held by such person as a proprietor of a property is conclusive proof that they are the owner of the property. They submitted that there being no evidence that the 1<sup>st</sup> Defendant obtained title by fraud as alleged by Plaintiff it is conclusive proof that the 1<sup>st</sup> Defendant is the registered owner of the suit property.
143. According to the Learned Counsel they would like to bring to the attention of this court that the Honourable Court in ***“Mombasa CM ELC No. 20 of 2018 Caffini Pierluigi - Versus - Jessica Margaret Adhiambo Oyigo (through her attorney Jared Omondi Onyango)”*** upheld that the 1<sup>st</sup> Defendant is the owner of the suit property. Having established that the transaction was registered lawfully and the 1<sup>st</sup> Defendant being the lawful owner of the suit property we humbly urge this Honourable Court to uphold the decision in ***“Mombasa CM ELC No. 20 of 2018 Caffini Pierluigi - Versus - Jessica Margaret Adhiambo Oyigo (through her attorney Jared Omondi Onyango)”*** that the 1<sup>st</sup> Defendant is the lawful owner of the suit property and grant the exclusive ownership and possession of the property to the 1<sup>st</sup> Defendant.

144. Finally, on whether the lease entry in the register of the suit property should be rectified. The Learned Counsel submitted that the Land Registration Act 2012 under Section 80 allows the court to direct the Registrar to rectify the Registrar by directing that any registration be cancelled or amended if the court is satisfied that the registration was obtained, made or omitted by fraud or mistake. In the case of ***“Esther Ndeai Niiru & Another - Versus - Leonard Gatei L2014) eKLR”***. the Court held that:-

***“...my view therefore is that where fraud or mistake is proved even what would qualify to be a first registration would under the provisions of the Land Registration Act be liable to be rectified and/or cancelled”.***

145. Further, in the case of ***“Mary Ruguru Njoroge - Versus - Samuel Gachuma Mbugua & 4 Others (2014) eKLR”***, the Court held that: -

***“It is however upto the party seeking rectification to prove to the court’s satisfaction that there has been fraud or mistake in the registration.”***

146. It was upon the party seeking rectification to prove to the Court’s satisfaction that there has been fraud or a mistake in the registration for the court to grant orders of rectification. The Plaintiff being the party seeking for rectification of the lease entry in the register over the suit property should satisfy that there has been a mistake or fraud in procuring the registration of the same which they have failed to do so. The Plaintiff having failed to prove the allegations of fraud we

submit that the lease entry in the register over the suit property was registered in a lawful manner as the 1<sup>st</sup> Defendant entered into an Agreement for Sale and purchase of the suit property with one Jared Omondi Onyango who was a holder of a power of attorney dated 5<sup>th</sup> April 2017 wherein the Plaintiff donated to him irrevocable power to execute and acknowledge documents in respect of selling a parcel of land subdivision L.R Number 1618 registered in the Mombasa registry.

147. The suit property in question was vested to the 1<sup>st</sup> Defendant having paid the agreed purchase price and the transaction being registered at the Ministry of Lands and a duly registered Lease Agreement being issued in favour of the 1<sup>st</sup> Defendant and having the same being confirmed by a post registration search. They further submitted that there were no fraudulent activities undertaken in registration in regard to the suit property. Thus, they urged this court that there being no fraud or mistake which occasions for rectification of an entry in the register by the court the same should not be allowed.

148. In conclusion, and in view of the analysis hereinabove, they urged this Honourable Court to dismiss the suit as it is not only litigating on determined issues but also inviting the Honourable Court to uphold their fallacy. Thus, we humbly pray that this Honourable Court declare the 1<sup>st</sup> Defendant to

be the lawful owner of the suit property and require the Plaintiff to deliver vacant possession to the 1<sup>st</sup> Defendant.

## **VII. Analysis and Determination**

149. I have keenly assessed the filed pleadings by all the Plaintiff and 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants herein, the written submissions by parties and the myriad of cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

150. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following six (6) salient issues for its determination. These are:

-

- a) Whether the Applicant was the lawful proprietor of the Suit Property.?***
- b) Whether the lease registered in favour of the 1<sup>st</sup> Respondent was fraudulent or validly executed?***
- c) Whether the 1<sup>st</sup> Respondent qualified as a bona fide purchaser for value without notice?***
- d) Whether the suit breached the Doctrine of Res judicata in light of Mombasa CM ELC No. 20 of 2018?***
- e) What are the appropriate reliefs available to parties.***
- f) Who meets costs of the suit?***

**ISSUE No. a). Whether the Applicant was the lawful proprietor of the Suit Property.**

### **151. The Site Visit Report.**

152. As already indicated, during the pendency of these proceedings, the Honourable Court conducted a site visit. Eventually it prepared and shared the report. The said report

forms part of this Judgement. It is reproduced verbatim herein for ease of reference.

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO .....41..... OF .....2019.**

**THE SITE VISIT REPORT OF THE VISIT HELD AT NYALI ESTATE ON 7<sup>TH</sup> FEBRUARY, 2025.**

**I. Introduction**

1. The site visit ("*Locus in Quo*") took place at Nyali Estate in the outskirts of the Mombasa township within the County of Mombasa. The team assembled at the site - specifically within the compound of the Alliance Francaise at 1.00pm. After short word of prayer the Judge provided the direction on how the site visit was to be undertaken by the team thereof.

**II. Present**

**A. The Court**

- a) Hon. Justice L.L. Naikuni, Presiding Judge, ELC No. 3.
- b) M/s. Firdaus Mbula - the Court Assistant.
- c) Mr. George Omondi - The Judge's Usher.
- d) Mr. - John Mwaniki Ngari - The Judge's Driver.

**B. The Plaintiffs**

- a) Ms. Waihenya Advocate - The Advocate for the Plaintiff.
- b) Mr. Francis Advocate - Advocate for the Plaintiff.
- c) M/s. Jessica Oyigo - The Plaintiff.
- d) Mr. Kennedy Manje - The Caretaker engaged by the Plaintiff.

**C. The Defendants**

- a) M/s. Khadija Advocate holding brief for M/s. Asli Osman Advocate - 1<sup>st</sup> Defendant.
- b) Mr. Samson - A Legal Assistant.

c) Ms Kiti Advocate – The Advocate for the 2<sup>nd</sup> Defendant.

(Hereinafter referred to as **“The Team”**)

### **C. Security Operatives**

- a). Corprol Bernard Malombe of Nyali Police station.
- b). PC Antony Kulei.
- c). PC Hawa Chibao.

### **III. The purpose for the Site Visit**

2. The Court informed the team the purpose of the site visit (**“Locus in Quo”**). It indicated that this was pursuant to a Court made on 10<sup>th</sup> December, 2024 in accordance with the provision of Section 173 of the Evidence Act, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, 2010 *to wit*: -

#### **Power to court to inspect;**

**“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”**

While Order 40 Rule 10 (1) (a) provided *to wit*: -

**“The Court may, on the application if any party to a suit, and on such terms as it thinks fit: -**

**(a) Make an order for .....Inspection of any property which is the subject matter to which any question may arise therein.**

3. By consensus of the parties, it was agreed that Site Visit be led by the Advocates and/or representatives of the parties present. The Judge elucidated that the site visit was not with a view of gathering further evidence on the case but to make observation on the factual realities on the ground to enable the Court in making a fair, just and equitable

decision. Ideally, the Honorable Court informed the team that the visit was purely to look, feel and observe on the issues brought in Court while inspecting the place.

4. Hence, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.
5. Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices or manual writing would be allowed, photography or video shooting was strongly condemned due to the likely hood of being abused particularly through social media. The report has endeavored to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

#### **IV. The Procedure**

6. The procedure upon which the site visit was to be conducted was explained to the team present. As indicated, it was mutually agreed that the team be guided by all Advocates for the Plaintiff and the Defendants who were knowledgeable of the place by moving around within and without the suit land.

#### **IV. The Observations.**

7. Upon conducting an elaborate inspection through walking into each of the plots and development situated within the suit property, the team made the following observations.

**a) The suit property:-** The suit land which measures 2 acres or thereabout rectangular in shape. It is found a long the Nyali Estate where an institution for **“The Alliance Francaise”** is situated within the Mombasa town. The suit land is well fenced using an eight (8) metre perimeter wall with a razor electric wire around the whole of the suit property for security purposes.

**b)** The suit property is physically divided into two using an approximately 150 metres long perimeter wall in between. The larger parcel of the land is occupied by Alliance Francaise while the other portion is the one that has a dispute. (Hereinafter referred to as **“The Disputed Portion”**).

**c)** The institution has its own gate and the compound has well manicured hedges, plantations and trees around it. There is huge building in its where they conduct their program. It is non - profit cultural organisation which offers a variety of French language courses fo all levels, including beginners, children and adults. They provide both in - person and online classes as well as international certification preparation.

**d)** The team learnt that the institution were on lease arrangement between themselves and the Plaintiff.

**e)** Further, the team learnt that the disputed portion was rectangular in shape. The said disputed portion had its own access though it appeared under - utilized for a long duration.

- f)** The team observed that there were some live activities taking place on this portion. On the upper side of the land were some old unkempt trees and plantations. The place was rather rocky and rather neglected. There was a 2500 litres plastic Water Tank; an old shallow well which appeared empty of water. The team assumed they were constructed in order to provide the poultry with water and this was confirmed from the pipes seen.
- g)** Additionally, in the middle of the disputed portion it was evident that there was a major poultry farming/keeping being undertaken within area. The team saw a long iron sheet and wire meshed shelter housing close to 70 chicks.
- h)** On the lower side of the disputed portion, the team noted some old storage spaces for the chicken feeds.
- i)** It was evident that a concrete slaughter house and shelters which we learnt were used as staff quarters. The team was informed that all these development were undertaken and belonged to the Plaintiff.
- j)** The team also took cognisance of the existence of some residential apartments behind the suit land.
- k)** The Defendant claimed to have been sold  $\frac{1}{4}$  acre. There was nothing tangible was pointed out in terms of development that was undertaken by the Defendant thereof.

## **V. Directions**

8. Towards the end of the visit, the Honourable Court made the following directions:-
- a) That the Honourable Court to endeavor finalise the Site Visit report to be shared with parties for their approval and finalization.**
- b) That parties were granted leave to file and serve their written submissions.**

**c) That the Honourable Court to render its Judgment on 20<sup>th</sup> June, 2025.**

There being no further business, the Site Visit came to an end at 2:50 p.m with a word of prayer.

**SITE VISIT REPORT PREPARED AND SHARED AT MOMBASA ON THIS .....23<sup>RD</sup> .....DAY OF .....MAY.....2025.**

.....  
**HON. MR. JUSTICE LL. NAIKUNI**  
**ENVIRONMENT AND LAND COURT AT**  
**MOMBASA**

153. Now turning to the issues under this sub - title, the court is called upon to examine whether the Plaintiff/Applicant, Ms. Jessica Margaret Adhiambo Oyigo lawfully acquired, registered and retained title to Title No. CR.13827/1 — Sub - division No. 1618 of Section 1 Mainland North, Nyali, Mombasa County and whether that title was defeated or displaced by the subsequent entries relied on by the 1<sup>st</sup> Defendant.

154. The brief facts of the case that concern this sub title are that the Applicant avers she is *“the sole heir to the estate of Joshua Oluoch Oyigo (Deceased) and the Suit Property was transmitted to me via a Deed of Assent on 10<sup>th</sup> March 2017 pursuant to a Grant issued in Succession Cause No. H.C. 857 of 2005.”* The Applicant states that *“upon receiving the Certificate of Postal Search I came to realize that the Lands Registrar had unlawfully registered a lease dated 2nd March*

*2018 to one Caffini Pierluigia for a term of 99 years ... as an encumbrance against my property.”*

155. The Applicant asserts continuous, exclusive possession (permanent wall; She leased it to the tenants - Alliance Francise for commercial purposes; rate statements in her name) and that she placed a caveat/restriction under Section 76 after learning of the dealings.

156. Under this sub title the issues then will be: -

**ISSUES FOR DETERMINATION**

- a. **Did the Applicant validly acquire and register the Suit Property by transmission (Deed of Assent) and thereby become lawful proprietor?**
  - b. **If so, can that registered proprietorship be defeated by the 1st Defendant’s subsequent lease entry?**
  - c. **What is the legal effect of the Section 76 restriction and the Registrar’s entries on the competing claims?**
157. The provision of Article 40 of the Constitution of Kenya provides for the protection of right to property and states as follows: -

**(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-**

- (a) of any description; and**
- (b) in any part of Kenya.**

**(2) Parliament shall not enact a law that permits the State or any person-**

- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**
- (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

**(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.**

**(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**

158. With the said registration, she attained prima facie conclusive evidence of ownership of the suit land. She became the absolute, legal and indefeasible owner with all the rights, interest and title vested in them by law of the suit property. He was issued with title deeds, which certificates of titles could only be challenged on the grounds of fraud, misrepresentation or irregular acquisition. This is provided for under the provision of Section 26 of the Land Registration Act, No. 3 of 2012.

159. Further, it is evident that a certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. The provision of Section

24 of the Land Registration Act (2012), gives the registered proprietor absolute rights over land, it provides:-

**Subject to this Act—**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

**(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.**

160. Under the provision of Section 25 of the Land Registration Act on the right of a proprietor, the law provides that: -

**(1)The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.**

161. It is also very clear that the title in respect of land is protected under the provision of Section 26 of the same Act, which provides: -

**(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.**

162. Flowing from the foregoing provisions, a registered proprietor enjoys the statutory protection of title as long as he/she can show that the title was acquired procedurally. The circumstances when title can be cancelled or revoked are enumerated under the provision of Section 26 (1) (a) & (b) of the Land Registration Act, No. 3 of 2012.

163. The provision of Section 79 (1) of the Land Registration Act, No. 3 of 2012 provides as follows:

**(1) The Registrar may rectify the register or any instrument presented for registration in the following cases—**

**(a) In formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor;**

**(b) In any case and at any time with the consent of all affected parties; or**

**(c) If upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel;**

**(d) For purposes of updating the register;**

**(e) For purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.”**

164. On the rectification by the court, the provision of Section 80 of the Land Registration Act, No. 3 of 2012 provides that:

**(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.**

165. Further to this, the provision of Section 76 of the Land Registration Act, No. 3 of 2012 provides for the Land

Registrar's power to enter restrictions/ caveats where improper dealings are suspected and it provides that: -

**(1) For the purposes of compulsory acquisition the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.**

**(2) A restriction may be expressed to endure—**

**(a) for a particular period;**

**(b) until the occurrence of a particular event; or**

**(c) until a further order is made,**

**and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.**

**(2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.**

**(3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.**

166. From the above provisions of law, it is clear that a certificate of title that is acquired procedurally is protected by the law. However, unprocedurally acquired certificate of title is a candidate for cancellation and or revocation. Such

cancellation can be done as provided by the Act. (See Section 25 of Land Registration Act).

167. In the case of ***“Dina Management Limited - Versus - County Government of Mombasa & 5 others – Supreme Court (21 April 2023) KESC 30 (KLR) (Constitutional and Human Rights) 21 April 2023 (Judgment)”*** while the case of ***“Munyu Maina - Versus - Hiram Gathiha Maina Civil Appeal No. 239 of 2009 (2013) eKLR”***, the Supreme Court clarified the purchaser’s onus and the scope of due diligence in land transactions, emphasizing that a purchaser who fails to take reasonable steps to verify title and the vendor’s authority cannot claim protection as a bona fide purchaser where irregularities are apparent, the Court rendered itself as follows: -

***“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”***

***To establish whether the Appellant is a bona fide purchaser for value, therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.”***

168. The decision reinforced that registration is powerful but not absolute where there is evidence of irregularity or fraud. Dina Management is directly on point for the question whether the

1<sup>st</sup> Defendant's reliance on a Power of Attorney and counsel's assurances (without personal verification) suffices to establish bona fide purchaser status. What can be gleaned from the case of:- **"Dina Management (Supra)"** is that a registered title though cloaked in outward authority of the register, is not in itself conclusive proof of ownership where its origin is in question. The law as restated by the Supreme Court does not permit a purchaser to hide behind registration where the foundation of that title is alleged to be unlawful.

169. In the case of:- **"Republic - Versus - Land Registrar Murang'a & another; Kamonye (Ex - Parte Applicant) (Judicial Review E001 of 2023) [2024] KEELC 4892 (KLR) (19 June 2024) (Judgment)"**, the ELC exercised supervisory jurisdiction to quash or restrain irregular entries and stressed the Registrar's duty to ensure lawful registration; the Judgment illustrates the Court's readiness to order rectification where the registry shows signs of improper dealing and where the Registrar's processes are implicated. This authority supports an application for rectification and removal of an encumbrance where the Registrar's entry is shown to be irregular and a restriction under Section 76 was properly invoked.

170. The Applicant produced documentary evidence of succession (Grant, Deed of Assent, provisional title application, rate statements) and swore she retained possession; the Land Registrar's evidence confirms a transmission entry and issuance of a provisional title in the Applicant's name. The

Applicant also produced a Certificate of Postal Search showing a later encumbrance/lease entry and the subsequent restriction under Section 76 of the Land Registration Act. The 1<sup>st</sup> Defendant relies on a sale/lease transaction executed through a Power of Attorney and on payments made, but admits never having met the Applicant who happens to be the legal and absolute registered owner to the suit property and that his acquisition depended on documents presented by intermediaries and his advocate. He also confessed only having visited the suit land once prior to actually purchasing it. The mode of payment of the purchase price was rather strange and unconventional. According to him, he would be sending monies to his Advocate assumably for onwards to the Donee of the Power of Attorney. No such empirical documentary evidence was produced to that effect.

171. Under the provision of Sections 24 to 26 of the Land Registration Act, No. 3 of 2012 a registered proprietor's title is prima facie evidence of absolute ownership and enjoys protection. The Applicant's Deed of Assent and registration steps, if regular, establish a prima facie proprietorship. The legal presumption of indefeasibility, however, is subject to the statutory exceptions where title was obtained by fraud, misrepresentation or illegal procedure. The pleadings and evidence raise precisely those exceptions as to the subsequent lease entry.

172. The Applicant must show a prima facie case of lawful title and that the encumbrance was irregular or fraudulent; the 1<sup>st</sup> Defendant must show he is a bona fide purchaser for value without notice and that he exercised due diligence. Where fraud is alleged, courts require clear and convincing proof of the fraudulent scheme that produced the impugned registration. From the 1<sup>st</sup> Defendant's own admissions (not having any direct contact with Applicant; reliance on a Power of Attorney whose execution the Applicant denies; delegation to advocates) weaken his claim to have been an innocent purchaser without notice.

173. The Applicant denies executing the Power of Attorney. She vigorously denied having executed the Power of Attorney. She produced passport and other documents showing she was abroad and that originals of title instruments were in counsel's custody. The 1<sup>st</sup> Defendant's evidence shows he did not verify the donor's execution in person and relied on his advocate's assurances. It is still very strange and self defeating that, despite of all peculiar and glaring circumstances, still the 1<sup>st</sup> Defendant never found it necessary or needful to have either joined as a party the Donee of the Power of Attorney - one Mr. Jared Omondi Onyango who has prominently featured in this transaction to this suit or better still summon him as a key witness in the matter in support of his case. The Court was left to keep grope in the dark as far as this aspect of the case and/or transaction was concerned. It was such a travesty of

Justice and an anti climax to say the least. Authorities cited in the pleadings (e.g., ***“Esther Ndegi Njiru [Supra]”***) emphasize that purchasers must go beyond a mere official search where circumstances suggest risk of fraud. The 1<sup>st</sup> Defendant’s failure to verify the donor’s authority or to contact the registered proprietor undermines his bona fide purchaser defence.

174. The evidence by the Land Registrar confirms the sequence: transmission to Applicant; later an entry reflecting a lease; and thereafter a restriction under Section 76 of the Land Registration Act when the Applicant’s advocates raised concerns. A restriction entered under Section 76 signals the Registrar’s view that the dealing warranted preservation of the status quo pending investigation — a factor that supports the Applicant’s claim of irregularity.

175. The 1<sup>st</sup> Defendant/Respondent relies on a separate decree (CM ELC No. 20/2018) and alleges having breached the ***“doctrine of Res Judicata”***. The record shows interlocutory orders and a stay/conservatory direction; the Court must assess whether any earlier decree conclusively determined title in a manner that bars this rectification claim. The pleadings and subsequent court directions (including stay and consolidation directions) indicate that the present proceedings properly challenge the register and that rectification jurisdiction remains open where fraud or irregularity is alleged. This matter was directed to this Court for further dealing by

the direction of the Lower Court. Certainly, I discern that “**the Doctrine of Res Judicata**” as stipulated under the provision of Section 7 of the Civil Procedure Act, Cap. 21 does not apply in his case.

176. In conclusion and relying on the facts and authorities before the Honourable Court, I strongly discern that the Applicant has established a prima facie lawful proprietorship by transmission (Deed of Assent and Grant) and by documentary evidence of registration and possession. On the contrary, the 1<sup>st</sup> Defendant/Respondent has not shown that he is a bona fide purchaser for value without notice: his acquisition depended on a Power of Attorney the Applicant denies, he did not personally verify the donor’s authority. The Honourable Court finds it mysterious for the 1<sup>st</sup> Defendant failure to join the Donee of the Power of Attorney to this suit through a third party proceeding or Counter – Claim; nor summoning the said Donee nor his Counsels who conducted the transaction as witnesses to corroborate on the assertions raised by him in his Defence in this case. Additionally, the 1<sup>st</sup> Defendant/Respondent over - relied on intermediaries and his Counsel in this transaction — conduct inconsistent with the due diligence required where risk of irregularity exists.

177. The lease entry registered in March 2018 is therefore tainted by irregularity and, on the present record, by fraud or misrepresentation, and the Section 76 restriction properly remains a live protective measure pending rectification.

178. This Honourable Court is satisfied that the Applicant is the lawful proprietor of the Suit Property and that the competing lease entry cannot stand without clearer proof that it was obtained lawfully and that the 1<sup>st</sup> Defendant/Respondent acted as a bona fide purchaser exercising due diligence. The Applicant is entitled to rectification of the register and protection of her possession, subject to the Court's final orders on relief and costs.

**ISSUE No. b). Whether the lease registered in favour of the 1<sup>st</sup> Defendant/Respondent was fraudulent or validly executed.**

179. Under this sub - title, the Honourable Court is called upon to examine whether the lease dated 2<sup>nd</sup> March 2018 and entered in the land register in favour of the 1<sup>st</sup> Defendant/Respondent was procured and registered lawfully, or whether it was tainted by fraud, misrepresentation or procedural irregularity such that the register must be rectified. On this sub - title we shall examine the following issues: -

- a. Was the Power of Attorney relied upon to effect the sale/lease validly executed and properly relied upon?**
- b. Did the 1<sup>st</sup> Respondent acquire the lease as a bona fide purchaser for value without notice and after exercising due diligence?**
- c. If the POA or transaction was irregular or fraudulent, does that vitiate the lease entry and require rectification of the register?**

180. The Applicant's sworn position was that she was the sole heir of the estate of Joshua Oluoch Oyigo (Deceased) and the Suit

Property was transmitted to her via a Deed of Assent on 10<sup>th</sup> March 2017 pursuant to a Grant issued in Succession Cause No. H.C. 857 of 2005. Upon receiving the certificate of postal search she came to the realization that the Land Registrar had unlawfully registered a lease dated 2<sup>nd</sup> March, 2018 to one Caffini Pierluigia for a term of 99 years as an encumbrance against her property.

181. The 1<sup>st</sup> Respondent produced a sale/lease agreement, a registered Power of Attorney said to have been executed by the Applicant's agent, payment records and a title issued in the 1<sup>st</sup> Respondent's name; the Applicant denies executing the Power of Attorney authorising any sale and asserts continuous possession and a Section 76 restriction was entered after her lawyers raised concerns. (Applicant's affidavit; court proceedings).
182. The Applicant produced a Grant, Deed of Assent and provisional title documents showing transmission in March 2017 and asserts uninterrupted possession; a lease in favour of the 1<sup>st</sup> Respondent appears in the registry dated 2<sup>nd</sup> March 2018; the Applicant denies executing any Power of Attorney to the effect that at that time she was never was around this Country or authorising sale. Indeed, from assessing her Passport, even the 1<sup>st</sup> Respondent admits that there was a possibility that the Plaintiff may not have been in the Country but argues that there were several other documents which the Plaintiff seem to have appended her signature without

necessarily being in the Country. For instance the Provisional certificate of Title. Further, the 1<sup>st</sup> Respondent has strongly held that the signature on the Power of Attorney resembled that on other documents eg, Supporting Affidavit. The Registrar later recorded a Section 76 of the Land Registration Act, No. 3 of 2012 restriction after the Applicant's lawyers complained. These facts place the competing claims squarely within the LRA's fraud/rectification exceptions. (Applicant's affidavit; Registrar's entries).

183. On whether the Power of Attorney and the subsequent lease were validly executed and relied upon, or whether the transaction was irregular/fraudulent such that the lease entry is defeasible. The legal test is twofold: (a) whether the instrument (POA/sale/lease) was validly executed and gave authority to transfer; and (b) whether the purchaser (1<sup>st</sup> Respondent) acted as a bona fide purchaser for value without notice and after reasonable verification. (*See the provision of Sections 26 and 80 of LRA*).

184. A registered title/ entry is prima facie evidence of ownership but is defeasible where fraud or unprocedural acquisition is proved. Where the where the registry shows irregular entries and a restriction has been entered, the Court will scrutinize the dealing and may order rectification. The case of:- **"Republic - Versus - Land Registrar, Murang'a (supra)"** illustrates the Court's readiness to quash or correct Registrar action when the underlying process was irregular.

185. On the purchaser's duty, recently in the case of: - "***Dina Management Limited - Versus - County Government of Mombasa & 5 others (Supra)***", and commentary has required active verification by purchasers; mere production of a Power of Attorney and payment, without independent verification of the donor's execution or absence of notice, is insufficient to establish bona fide purchaser protection where red flags exist.
186. The Applicant denies executing the Power of Attorney; the 1<sup>st</sup> Respondent admits never meeting the Applicant and relied on intermediaries and counsel. Where the donor denies execution and the purchaser did not verify execution (for example by requiring the donor's personal appearance, independent attestation, or corroborating evidence), the authenticity of the Power of Attorney is in serious doubt. Under the LRA the Registrar should not accept dispositions based solely on a contested Power of Attorney without proper verification.
187. The 1<sup>st</sup> Respondent's own evidence (no personal contact with the donor; reliance on advocate assurances; payment via intermediaries) shows limited or no independent verification. Recent authorities require purchasers to take reasonable steps where circumstances suggest risk; failure to do so undermines a claim to be a bona fide purchaser for value without notice. The Dina Management line of authority and ELC practice emphasize that registration is not an absolute

shield where the purchaser had constructive or actual notice or failed to exercise due diligence.

188. The Registrar's placement of a restriction after the Applicant's complaint is a material indicator that the dealing warranted scrutiny; the restriction preserves the status quo and supports the Applicant's contention of irregularity. The Court in Murang'a treated such Registrar action as a basis for judicial review and rectification where appropriate.
189. Legally speaking, fraud and or unprocedural acquisition must be proved on the balance of probabilities in civil land disputes, but the evidence here (Applicant's documentary succession proof; denial of Power of Attorney; the Land Registrar restriction; purchaser's admissions) collectively raises a strong prima facie case of irregularities. If the Court finds the Power of Attorney was forged or the purchaser failed to verify authority, Section 80 of the Land Registration Act empowers the Court to order rectification and removal of the encumbrance.
190. In conclusion and on the present record and applying the statutory test and authorities hereinabove, this Court concludes under this sub title that the lease registered in favour of the 1<sup>st</sup> Respondent is, on the evidence before the Court, tainted by serious irregularity and is not shown to have been validly executed in a manner that protects the 1<sup>st</sup> Respondent as a bona fide purchaser for value without notice. The Applicant has produced documentary proof of

transmission and possession and has denied executing the Power of Attorney; the 1<sup>st</sup> Respondent admits reliance on intermediaries and did not personally verify the donor's authority; the Registrar entered a restriction under the provision of Section 76 after concerns were raised — all factors that point to an irregular or fraudulent dealing rather than a clean, valid transaction.

**ISSUE No. c). Whether the 1<sup>st</sup> Respondent qualified as a bona fide purchaser for value without notice**

191. Under this sub - title, the court shall examine whether the 1<sup>st</sup> Respondent acquired the lease in good faith for valuable consideration and without actual or constructive notice of the Applicant's competing proprietary rights, and whether he took the reasonable steps of verification required by recent Kenyan authority.

192. Under this sub - title the issues for determination are:

- a. **Did the 1<sup>st</sup> Respondent pay valuable consideration for the lease?**
- b. **Did he have actual or constructive notice of the Applicant's competing title or of circumstances that required inquiry?**
- c. **Did he exercise reasonable due diligence before relying on the Power of Attorney and registering the lease?**
- d. **If not, does the lease lose protection as a bona fide acquisition and become subject to rectification?**

193. The Applicant produced a Grant and Deed of Assent (March 2017) and asserts continuous possession and rate records in her name. A lease dated 2<sup>nd</sup> March 2018 in favour of the 1<sup>st</sup>

Respondent appears on the registry as an encumbrance over a quarter portion of the Suit Property. The 1<sup>st</sup> Respondent admits he never met the Applicant, relied on a Power of Attorney and on his advocate/intermediaries, and paid the purchase price through third-party transfers. The Land Registrar later recorded a Section 76 of the Land Registration Act restriction after the Applicant's lawyers complained.

194. On whether the 1<sup>st</sup> Respondent paid valuable consideration for the lease, under this subtitle, the court shall examine whether there is evidence that the 1<sup>st</sup> Respondent actually paid money or other valuable consideration for the lease dated 2<sup>nd</sup> March 2018. The 1<sup>st</sup> Respondent's replying affidavit and exhibits assert payment of the purchase price and rates. The Applicant denies receiving any payment and disputes the vendor/Power of Attorney.
195. Valuable consideration in conveyancing means any payment or benefit given in exchange for the interest; it need not equal market value but must be real and provable (e.g., bank transfers, receipts, sworn statements). Documentary proof of payment (bank transfer records, official receipts, sworn evidence of payment) ordinarily suffices to establish that consideration was paid.
196. In the case of ***“Arthi Highway Developers Limited - Versus - West End Butchery Limited & 6 others (2015) eKLR”***, the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and held that a party

cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. Further in the Uganda Court of Appeal Case of **“Katende - Versus - Haridar & Company Limited (2008) 2 EA 173”**, the Court defined what amounts to a bona fide purchaser for value thus:

**“A bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:**

- a. He holds a Certificate of Title**
- b. He purchased the Property in good faith;**
- c. He has no knowledge of the fraud;**
- d. The vendors had apparent valid title;**
- e. He purchased without notice of any fraud;**
- f. He was not party to any fraud.**

**A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”**

197. While in the case of **“Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura - Versus - Attorney General & 4 others (2017) eKLR”**, the Court of Appeal held that a party cannot claim a bona fide purchaser for value where the vendor did not have a valid title.

198. Yet in the case of **“Munyu Maina - Versus - Hiram Gathiha Maina, (Supra)”**, the Court of Appeal held that:-

**“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any**

***encumbrances including any and all interests which would not be noted in the register.”***

199. Whether that payment confers protection as a bona fide purchaser is a separate inquiry (notice and due diligence). The 1<sup>st</sup> Respondent has sworn that he paid a sum of Kenya Shillings Four Million Seven Nineteen Five Seventy Eight (Kshs. 4,719,578.00) on 8<sup>th</sup> March 2018 and a further sum of Kenya Shillings Two Seventy Three Thousand Nine Twenty Two (Kshs. 273,922.00/=) on 23<sup>rd</sup> March 2018; those averments are supported in the bundle by a SWIFT transfer and official rate receipts (CP-3; CP-4). On their face these documents establish that money changed hands. The Applicant denies receiving any RTGS or direct payment and says she never authorized the transaction. The 1<sup>st</sup> Respondent's evidence indicates payments were routed through intermediaries (advocates; a named payee, Stephen Obaga Muriuki). Payments made to a third party or to an advocate do not negate that consideration was paid, but they do raise questions about the proper payee and whether the vendor actually received the purchase price.
200. For the limited question whether valuable consideration was paid, the 1<sup>st</sup> Respondent's sworn payment evidence together with bank transfer documents and official receipts is sufficient to establish that consideration was provided. The weight and lawful application of those payments (i.e., whether they were paid to the true vendor or procured a lawful transfer) go to the separate issues of notice, due

diligence and whether the purchaser is protected as bona fide.

201. On the documentary record before the Court there is credible evidence that the 1<sup>st</sup> Respondent paid valuable consideration for the lease (payments of a sum of Kenya Shillings Four Million Seven Nineteen Five Seventy Eight (Kshs. 4,719,578.00/=) and (Kshs.273,922.00/=) are sworn and supported by transfer/receipt documents). The caveat is that establishing payment answers only the “consideration” element. It does not resolve whether the payment was made to the lawful vendor, whether the purchaser had notice, or whether the purchaser exercised reasonable due diligence — those are distinct inquiries that must be determined separately.
202. On the next question it is evident that the Applicant produced a Grant and Deed of Assent (March 2017) and asserts continuous possession, a permanent wall and rate records in her name. A lease dated 2<sup>nd</sup> March 2018 appears in the register in favour of the 1<sup>st</sup> Respondent over a quarter portion of the Suit Property. The 1<sup>st</sup> Respondent admits he never met the Applicant, relied on a Power of Attorney and on his Advocate/intermediaries, and paid the purchase price through third-party transfers. A Section 76 of the Land Registration Act restriction was entered on the title after the Applicant’s lawyers complained.

203. As I have previously stated in this Judgment that the provision of Article 40, Constitution 2010 protects property rights. The Land Registration Act on the other hand provides that registration gives prima facie protection but is subject to exceptions where entries were procured by fraud or irregularity; Section 76 empowers the Registrar to enter restrictions where improper dealings are suspected; Sections 24-26, 79-80 govern indefeasibility and rectification.

204. A purchaser is protected only if he paid value, had no actual or constructive notice, and exercised reasonable due diligence; where circumstances raise suspicion a purchaser must make inquiries.

205. There is no direct evidence that the 1<sup>st</sup> Respondent personally knew of the Applicant's Deed of Assent or of her possession prior to purchase. He expressly admitted he never met the Applicant and that his acquisition depended on documents and his advocate's assurances. On the narrow question of actual knowledge, the record does not show the 1<sup>st</sup> Respondent had direct, personal knowledge of the Applicant's title before registration.

206. A constructive notice arises where facts known to the purchaser, or discoverable by reasonable inquiry, would have put a prudent purchaser on inquiry. The following objective facts from the record are relevant:

- a. Recent transmission and registration history: The Applicant's Deed of Assent and provisional title dated March 2017 were recent and on the registry; a prudent

purchaser confronted with a recent transmission should be alert to the possibility of competing claims.

- b. Possession and visible occupation: The Applicant asserts continuous possession, a permanent wall and tenants (Alliance Française). Visible occupation and possession are classic sources of constructive notice; a purchaser who inspects the land and sees occupation cannot claim ignorance. The 1<sup>st</sup> Respondent admitted visiting the plot only briefly and did not verify who was in possession.
  - c. Power of Attorney and intermediated dealings: the transaction was effected through a Power of Attorney and intermediaries; where a purchaser relies on a Power of Attorney for a private individual's land, the circumstances ordinarily require verification of the donor's execution and authority. Reliance solely on a produced Power of Attorney without independent verification is risky.
  - d. Registrar's subsequent restriction (Section 76): the fact that the Registrar later entered a restriction after the Applicant's lawyers complained is a strong indicium that the dealing was suspicious; while the restriction post-dates the registration, it corroborates that the transaction presented red flags.
  - e. Admissions by the 1<sup>st</sup> Respondent: he admitted he never met the Applicant and that he relied on his advocate and documents; such admissions show he did not take the active verification steps a prudent purchaser would take when the chain of title is recent or when occupation is apparent.
207. Recent Kenyan jurisprudence and ELC practice require purchasers to take reasonable steps where circumstances suggest risk (for example: require production of original executed instruments, obtain independent attestation of

signatures, contact the registered proprietor, inspect possession and obtain vendor's direct confirmation). The 1<sup>st</sup> Respondent did not personally verify the donor's execution, did not obtain direct confirmation from the Applicant, and delegated verification to counsel — conduct that falls short of the due diligence standard where constructive notice exists.

208. There was no actual notice established on the present record. There is no direct evidence the 1<sup>st</sup> Respondent personally knew of the Applicant's title before the transaction. The combination of a recent transmission on the register, the Applicant's continuous and visible possession, the use of a Power of Attorney and intermediated payments, and the purchaser's own admissions created circumstances that would have put a reasonable purchaser on inquiry. The 1<sup>st</sup> Respondent therefore had constructive notice or at least was on inquiry. Because constructive notice existed and the 1<sup>st</sup> Respondent failed to take reasonable verification steps, he cannot rely on the protection afforded to an innocent purchaser without notice. The lease is therefore open to challenge and rectification if the Power of Attorney or transaction is shown to be forged, unprocedural or obtained by misrepresentation.

209. On the next sub topic, the court shall examine whether the 1<sup>st</sup> Respondent took the reasonable steps of verification and inquiry that Kenyan law and recent authority require before relying on a Power of Attorney and registering a lease over

land already showing recent transmission and occupation. Short answer: on the present record he did not exercise reasonable due diligence; his conduct falls short of the standard set by recent Kenyan authority and practice.

210. The Applicant's position is that the transmission by Deed of Assent (10<sup>th</sup> March, 2017), continuous possession, rate records in her name; she denies executing the Power of Attorney. The 1<sup>st</sup> Respondent's position was the reliance on a Power of Attorney and intermediaries, admits never meeting the Applicant, produced payment records and a registered lease. A restriction was entered by the Applicant. Where a registered transmission is recent and the land is visibly occupied, a prudent purchaser should at minimum:

- a. inspect possession and confirm who occupies the land;
- b. demand production of original executed instruments (original POA, deed of assent, grant) and verify signatures/witnesses;
- c. require direct contact or sworn confirmation from the registered proprietor or independent attestation of the donor's execution;
- d. verify payment trail to the true vendor (not only to an intermediary or advocate).

211. The 1<sup>st</sup> Respondent admitted no personal contact with the Applicant; relied on documents presented by intermediaries and his advocate; paid through third parties; did not produce evidence of independent verification of the Power of Attorney's execution or of direct confirmation from the Applicant. These admissions show passive reliance rather

than active verification. Recent Kenyan jurisprudence (and commentary applying the case of:- ***“Dina Management (Supra)”*** principles) holds that registration and payment alone do not protect a purchaser who ignored obvious red flags (recent transmission, visible occupation, contested Power of Attorney). A purchaser in such circumstances must make inquiries; failure to do so converts what might be an innocent purchase into one with constructive notice of competing claims.

212. The 1<sup>st</sup> Respondent did not exercise reasonable due diligence before relying on the Power of Attorney and registering the lease; he therefore cannot safely claim the protection of a bona fide purchaser without notice.
213. On the effect of failing the bona fide purchaser test, the registered lease is not automatically invulnerable. Where a purchaser cannot show absence of notice and reasonable due diligence, the statutory protection that registration normally affords is not absolute. If a registered interest was procured by fraud, misrepresentation or through unprocedural steps, the register is open to correction.
214. On the facts here the 1<sup>st</sup> Respondent: (i) relied on a contested Power of Attorney while admitting he never met the registered proprietor; (ii) paid through intermediaries rather than to a clearly identified Vendor; and (iii) ignored visible indicia of occupation and a recent transmission. Those facts establish constructive notice and a failure to exercise

reasonable due diligence. Under settled principles the 1<sup>st</sup> Respondent therefore cannot claim the full protection of an innocent purchaser.

215. The Court must be satisfied on the balance of probabilities that the entry was procured by fraud, misrepresentation or irregular procedure, or that the purchaser had notice and failed to take reasonable steps. The Applicant has produced documentary proof of transmission and possession and the Registrar has recorded a Section 76 restriction — together these facts raise a strong prima facie case of irregularity.

216. Because the 1<sup>st</sup> Respondent did not establish that he was a bona fide purchaser for value without notice and failed to exercise reasonable due diligence, the lease does not retain the full protection of an indefeasible registered interest and is subject to rectification if the Power of Attorney or transaction is shown to be forged, unprocedural or obtained by misrepresentation.

217. The Respondent's reliance on a forged Power of Attorney tainted the root of his title. The doctrine of bona fide purchaser cannot protect a party whose acquisition is founded on fraud. Due diligence was not conducted; the Respondent failed to verify the authenticity of the Power of Attorney or consult the registered owner. His claim therefore collapsed. The Court held that the 1<sup>st</sup> Respondent was not a bona fide purchaser for value without notice, as his acquisition was tainted by fraud, irregularities and illegality.

**ISSUE No. d). Whether the suit was in breach of the Doctrine of Res Judicata in light of Mombasa CM ELC No. 20 of 2018**

218. Under this sub - title, the court shall examine whether the issues and reliefs now before the Court were finally and conclusively determined by Mombasa CM ELC No. 20 of 2018, such that the present Originating Summons (ELC No. 41 of 2019) is barred by the doctrine of res judicata, issue estoppel, or abuse of process. The 1<sup>st</sup> Respondent relies on the case of:- **“CM ELC No. 20 of 2018 (Caffini Pierluigia - Versus - Jessica Margaret Adhiambo Oyigo through her attorney Jared Omondi Onyango)** and asserts that a decree was issued in his favour declaring him legal owner and ordering delivery of vacant possession.

219. The substantive law on *Res Judicata* is found in the provision of Section 7 of the Civil Procedure Act Cap. 21 which provides that:

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”**

220. The Black’s law Dictionary 10<sup>th</sup> Edition defines *“res judicata”* as **“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the**

**involvement of same parties, or parties in privity with the original parties...”**

221. A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions. In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

- i. what issues were really determined in the previous Application;**
- ii. whether they are the same in the subsequent Application and were covered by the Decision.**
- iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.**

222. Kuloba J., in the case of:- ***“Njangu - Versus - Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported)”***, held that:

***“If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”***

223. In the Court of Appeal case of:- **“Siri Ram Kaura - Versus - M.J.E. Morgan, CA 71/1960 (1961) EA 462”** the then EACA stated that: -

***“The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...***

***The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...***

***The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.***

***It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.”***

224. Hon. Justice G.V. Odunga in the case:- **“Republic - Versus - Attorney General and Another Ex - Parte James Alfred Koroso”**, expressed himself thus on the issue of access to justice: -

***“Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others.”***

225. A decision of the court must be respected as fundamental to any civilised and just judicial system. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court. A decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. These principles would be ‘substantially undermined’ if the Court were to revisit them every time a party is dissatisfied with an Order and goes back to the same Court particularly when there is a change of a Judicial Officer in the Court station. Whether a claim is allowed or dismissed by consent, default or after a contested hearing, the need for finality is the same in each instance.

226. The Applicant (now Plaintiff) filed the present Originating Summons (ELC No. 41 of 2019) seeking rectification of the land register and removal of a lease entry registered 2<sup>nd</sup> March 2018. The court file in ELC No. 41/2019 records interlocutory and conservatory orders (including a stay and directions dated 7<sup>th</sup> November 2019) and later directions for consolidation/recall and further hearings. The record shows

the matter has been the subject of subsequent proceedings, stays and interlocutory relief.

227. The 1<sup>st</sup> Respondent pleads res judicata and contends the present suit is an attempt to relitigate matters already determined in CM ELC No. 20/2018. Res judicata / cause of action estoppel is where a final judgment on the merits between the same parties (or their privies) on the same cause of action bars re-litigation of the same claim. Finality is essential. Where an issue of fact or law was necessarily decided in earlier litigation between the same parties, that issue cannot be relitigated.
228. Res judicata does not apply where the earlier decision was not final (e.g., stayed, set aside, under appeal, or subject to recall/consolidation), where the remedy sought is different in substance, or where the earlier judgment was obtained by fraud or collusion
229. On the finality of CM ELC No. 20 of 2018. The record in ELC No. 41/2019 shows interlocutory conservatory orders and a stay issued on 7<sup>th</sup> November 2019 and directions to move to the superior court for recall and consolidation. A stay or an order setting aside or suspending the operation of a Judgment removes the element of finality required for res judicata. If CM ELC No. 20/2018 was stayed, set aside, or the subject of recall/consolidation directions, it cannot operate as a final bar to subsequent proceedings unless and until the stay is lifted and the Judgment is restored as final and

unappealed. The Court must therefore first determine the procedural status of CM ELC No. 20/2018 (final, stayed, set aside, under appeal, or recalled).

230. CM ELC No. 20/2018 appears to have been a suit for vacant possession and related reliefs, whereas the present Originating Summons seeks rectification of the land register (removal of an encumbrance) and declaratory relief as to proprietorship. Although the factual matrix overlaps (same parcel, same parties, same disputed instruments), the legal remedies differ: possession/ejectment versus rectification of the register. Res judicata requires the same cause of action; where remedies differ and the present claim raises statutory questions about the validity of registry entries (fraud on the register), the Court should be cautious about applying cause-of-action estoppel.

231. If CM ELC No. 20/2018 necessarily decided a specific issue (for example, the authenticity of a particular instrument) and that issue is identical and essential to the present claim, issue estoppel could apply to that narrow issue — but only if the earlier decision was final and the issue was actually litigated and determined. The present record does not show that CM ELC No. 20/2018 conclusively determined the authenticity of the Power of Attorney or the lawfulness of the Registrar's entries in a manner that precludes judicial review or rectification.

232. The existence of court directions to stay, recall, or consolidate files indicates the earlier Judgment's finality was at least questioned. Where a superior court or the same court has ordered recall/consolidation or stayed execution, the remedy of rectification remains open until the earlier judgment attains finality. The Court must therefore treat the plea of res judicata with caution and first resolve the procedural status of the earlier file.

233. Plus the Honourable Court notes that if the present application alleges that the earlier judgment or the registry entries were procured by fraud, the Court retains jurisdiction to examine and, if necessary, set aside or rectify the register. Final Judgments obtained by fraud are susceptible to challenge; rectification proceedings are a recognized route to correct the register even where prior litigation exists. The 1<sup>st</sup> Respondent's bare assertion of res judicata is insufficient. The Court should require production of the full record and decree in CM ELC No. 20/2018, any subsequent orders (stays, recalls, appeals), and evidence of whether the decree was executed, appealed, or set aside. Only after establishing that the earlier Judgment is final, unappealed, and on the same cause of action can res judicata be applied to bar the present suit.

234. It is therefore this Honourable Court opinion that Res judicata does not automatically bar the present suit. On the material before this Court:

- (a) CM ELC No. 20/2018 involved overlapping facts but different primary remedies (possession versus rectification);**
- (b) the court file in ELC No. 41/2019 records interlocutory stays and directions to recall/consolidate, undermining finality; and**
- (c) the present application raises statutory questions about the validity of registry entries and alleged fraud that justify independent judicial scrutiny.**

235. I do note that on 7<sup>th</sup> November, 2019 there was an order setting aside the Judgment in the lower court and any consequential orders and consolidating the suits. To this point, I reiterate that the plea for res judicata fails at this stage.

**ISSUE No. e). What are the appropriate reliefs entitled to parties.**

236. Under this sub - title, the court shall examine and, having done so, make the following orders and declaratory reliefs appropriate to vindicate the Applicant's proprietary rights, preserve the integrity of the register and protect third-party interests pending final determination. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court is satisfied that:

- a. **On the land ownership:-** the Applicant lawfully acquired the Suit Property through succession and transmission by Deed of Assent, supported by statutory authorities under the provision Sections 24 and 25 of the Land Registration Act, No. 3 of 2012.
- b. **On the lease:-** the registration in favour of the 1<sup>st</sup> Respondent was fraudulent, unprocedural, and void ab initio, as it was founded on a forged Power of Attorney,

contrary to Section 26 (1) of the Land Registration Act, No. 3 of 2012 and Article 40 (6) of the Constitution of Kenya, 2010.

- c. **On bona fide purchaser:-** the 1<sup>st</sup> Respondent could not invoke protection under equity where the root of title was tainted by fraud. His failure to conduct due diligence disqualified him from the doctrine.
- d. **On res judicata:-** the present suit was not barred, as the earlier proceedings in CM ELC No. 20 of 2018 involved different parties and issues, contrary to the requirements of Section 7 of the Civil Procedure Act, Cap. 21.
- e. **Appropriate relief from the intermediaries:-** the 1<sup>st</sup> Respondent is left with a legal option to seek remedies from the intermediaries – Mr. Jared Omondi Onyango and the then ostensible Plaintiff's Advocate Stephen Obaga Muriuki whom he claims to have been dealing with in this transaction. He claims to have executed papers with them and even remitted the consideration through them and not directly to the vendor. Unfortunately, they all duped him and hence they owe him his monies and damages whatsoever. \_

237. In a nutshell, therefore, on the preponderance of probabilities and the balance of convenience, the Court finds that the Applicant has established her case against the Respondents.

**ISSUE No. f). Who bears the costs of the suit**

238. Under this subtitle, the court shall examine the allocation of costs in light of the findings on ownership, validity of the lease, and the conduct of the parties. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any

litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action.

239. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of **“Harun Mutwiri - Versus - Nairobi City County Government [2018] eKLR** and **“Kenya Union of Commercial, Food and Allied Workers - Versus - Bidco Africa Limited & Another [2015] eKLR**, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of **“Hussein Muhumed Sirat - Versus - Attorney General & Another [2017] eKLR**, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

240. In the case of:- **“Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another - Versus - Mutula Kilonzo & 2 others [2013] eKLR”** quoted the case of **“Levben Products - Versus -Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227”** the Court held;

**“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”**

241. In the present case, costs of the suit should be borne by the 1<sup>st</sup> Respondent. He is the party whose conduct necessitated the litigation and whose reliance on irregular instruments caused the dispute. The Land Registrar (2<sup>nd</sup> Respondent), having acted within statutory powers by entering a restriction, should not bear costs unless evidence shows complicity in the irregular registration.

**I. Conclusion and Disposition**

242. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court, on the preponderance of probabilities and the balance of convenience, finds that the Applicant has established her case against the Respondents. The evidence demonstrates that the lease registered in favour of the 1<sup>st</sup> Respondent was fraudulent, unprocedural, and incapable of defeating the Applicant's lawful title. Thus, the Court proceeds to make the following specific orders:

**(a) THAT Judgment be and is hereby entered in favour of the Applicant in respect to the Originating Summons dated 13<sup>th</sup> March 2019, with costs.**

**(b) THAT the Certificate of Lease dated 2<sup>nd</sup> March 2018 registered in favour of the 1<sup>st</sup> Respondent, purporting to grant a 99-year term from 1<sup>st</sup> June 1970 over Title No. CR.13827/1 - Sub - division No. 1618 of Section 1 Mainland North, Mombasa County, be and is hereby declared null and void.**

- (c) **THAT** a declaration do and is hereby issued that the Applicant, Jessica Margaret Adhiambo Oyigo, is the registered, lawful, and absolute proprietor of the Suit Property, entitled to exclusive and unimpeded possession and occupation thereof.
- (d) **THAT** the 2<sup>nd</sup> Respondent, the County Land Registrar Mombasa, do and is hereby directed to rectify the land register by cancelling the fraudulent entries relating to the purported lease in favour of the 1<sup>st</sup> Respondent and restoring the register to reflect the Applicant's ownership.
- (e) **THAT** an order do and is hereby issued for a Permanent Prohibitory Injunction restraining the 1<sup>st</sup> Respondent, whether by himself, his servants, agents, employees, or anyone claiming under him, from entering upon, re-entering, trespassing onto, laying a claim to, building on, interfering with, and/or in any manner whatsoever dealing with the Applicant's property known as Title No. CR.13827/1 - Sub - division No. 1618 of Section 1 Mainland North, Mombasa County.
- (f) **THAT** the 1<sup>st</sup> Respondent may consider seeking legal remedy and/or appropriate legal relief from Mr. Jared Omondi Onyango the alleged Donee of the Power of Attorney and the ostensible then Plaintiff's Advocate Mr. Stephen Obaga Muriuki.
- (g) **THAT** the Applicant shall have the costs of the suit, together with interest thereon at court rates, by virtue of the Originating Summons dated 13<sup>th</sup> March 2019. The Land Registrar (2<sup>nd</sup> Respondent),

**having acted within statutory powers by entering a restriction, should not bear costs unless evidence shows complicity in the irregular registration.**

**IT IS SO ORDERED ACCORDINGLY**

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS  
VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA.....  
23<sup>RD</sup> .....DAY OF .....MARCH.....2026.**

.....  
**HON. MR. JUSTICE L.L. NAIKUNI  
ENVIRONMENT AND LAND COURT  
AT MOMBASA**

**Judgement delivered in the presence of: -**

- a) M/s. Firdaus Mbula - the Court Assistant.
- b) M/s. Sheila Maiga Advocate holding brief for M/s. Waihenya Advocate for the Plaintiff/Applicant.
- c) M/s. Khadija Advocate holding brief for M/s. Asli Osman Advocate for the 1<sup>st</sup> Respondent.
- d) M/s. Kiti Advocate for the 2<sup>nd</sup> Respondent.